Reversed Thom
Judge Strong
& Clerk

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~358.~~ ~~356~~ 72

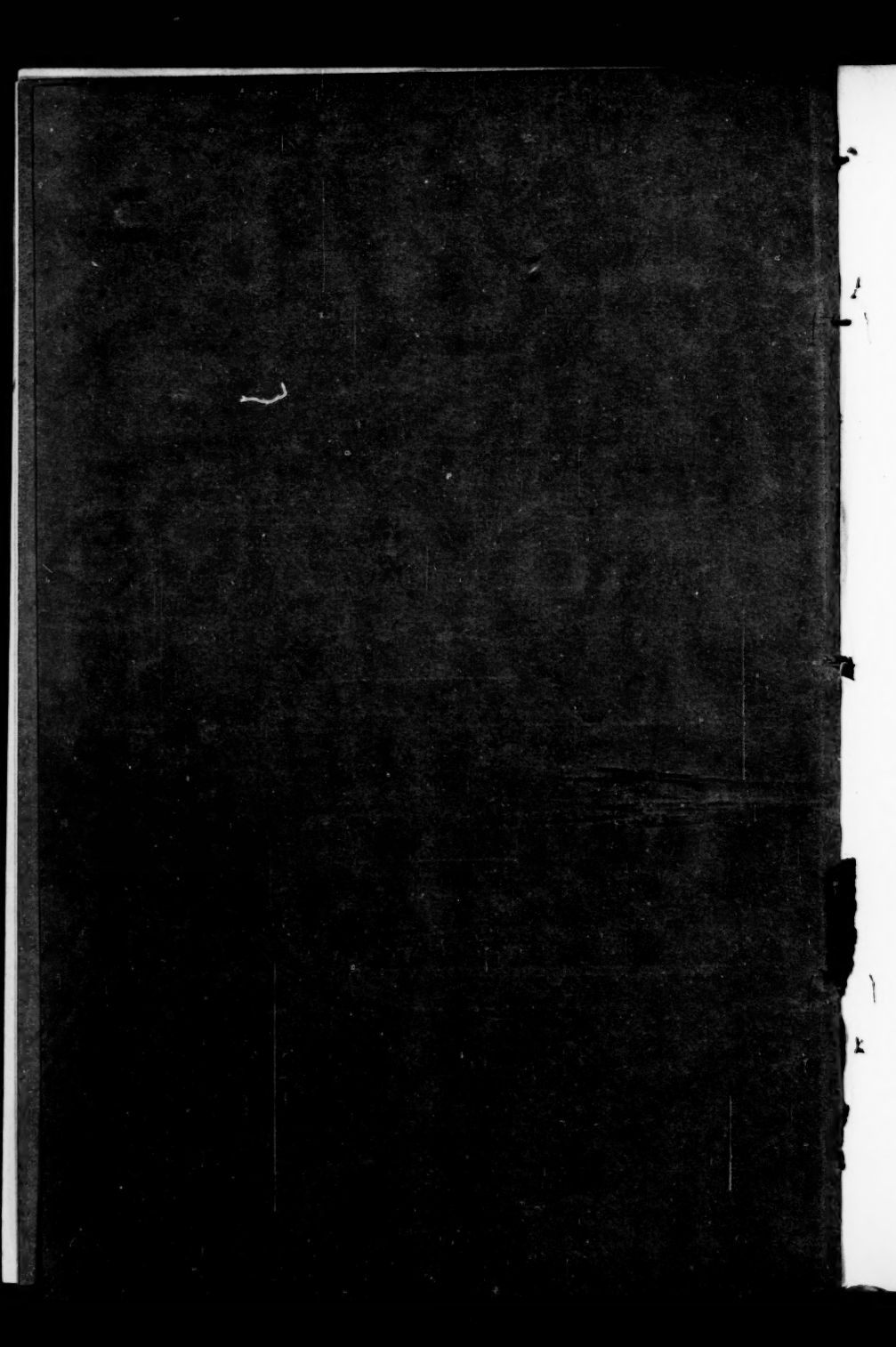
THE PHILADELPHIA AND READING RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED DECEMBER 8, 1870.



SUPREME COURT OF THE UNITED STATES.

No. 358.

THE PHILADELPHIA AND READING RAILROAD COMPANY, PLAINTIFF IN ERROR,

VS.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

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1 In the court of common pleas in and for the county of Dauphin, State of Pennsylvania.

Among the records of the court of common pleas of Dauphin County to January term, 1867, No. 6, it is contained as follows, to wit:

Docket entry.

B. H. Brewster.
Campbell and Kunkel.

THE COMMONWEALTH OF PENNSYLVANIA
vs.
PHILADELPHIA AND READING RAILROAD COMPANY.

Appeal by defendant from the settlement of the auditor general and state treasurer.

November 29, 1866, appeal and specifications filed.
Same day, bond filed.
July 31, 1867, narr. and copy of account filed.
Same day, rule on defendant to plead on 30 days' notice or judgment, and same day defendant pleads, "nil debet and payment."

2 November term, 1867, on issue list and continued.

December adjourned court, 1867, on issue list. Trial ordered, jury called, come, &c., twelve good and lawful men of the county of Dauphin, duly selected, summoned, &c., who being duly sworn and affirmed according to law, do say, December 17, 1867, that they find in favor of defendant.

April 3, 1868, writ of error from supreme court received and filed.
May 4, 1868, notes and charge of the court filed.
Same day judgment on the verdict.

DAUPHIN COUNTY, *ss:*

Certified from the record.
Harrisburg, May 16, 1868.

SEAL OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY.

JOS. H. NESSLEY,
Prothonotary.

3 *Specifications of objections to the settlement of the account by the auditor general and State treasurer of Pennsylvania.*

In the matter of the account settled by the auditor general and State treasurer of the Commonwealth of Pennsylvania, between The Commonwealth of Pennsylvania and The Philadelphia and Reading Railroad Company for taxes claimed to be due to the said Commonwealth for the quarters ending respectively, December 31st, 1865, March 31st, 1866, and June 30th, 1866, under the provisions of the act of the General Assembly of the Commonwealth of Pennsylvania, approved August 25th, 1864, entitled "An act to provide additional revenue for the use of the Commonwealth."

The said The Philadelphia and Reading Railroad Company appeals from the said settlement, a copy of which is hereto annexed, to the

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Judgment	76	41
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Docket entry.

B. H. Brewster.
Campbell and Kunkel.

THE COMMONWEALTH OF PENNSYLVANIA
vs.
PHILADELPHIA AND READING RAILROAD COMPANY.

Appeal by defendant from the settlement of the auditor general and state treasurer.

November 29, 1866, appeal and specifications filed.
Same day, bond filed.
July 31, 1867, narr. and copy of account filed.
Same day, rule on defendant to plead on 30 days' notice or judgment, and same day defendant pleads, "nil debet and payment."

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April 3, 1868, writ of error from supreme court received and filed.
May 4, 1868, notes and charge of the court filed.
Same day judgment on the verdict.

DAUPHIN COUNTY, *ss:*

Certified from the record.
Harrisburg, May 16, 1868.

SEAL OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY.

JOS. H. NESSLEY,
Prothonotary.

3 *Specifications of objections to the settlement of the account by the auditor general and State treasurer of Pennsylvania.*

In the matter of the account settled by the auditor general and State treasurer of the Commonwealth of Pennsylvania, between The Commonwealth of Pennsylvania and The Philadelphia and Reading Railroad Company for taxes claimed to be due to the said Commonwealth for the quarters ending respectively, December 31st, 1865, March 31st, 1866, and June 30th, 1866, under the provisions of the act of the General Assembly of the Commonwealth of Pennsylvania, approved August 25th, 1864, entitled "An act to provide additional revenue for the use of the Commonwealth."

The said The Philadelphia and Reading Railroad Company appeals from the said settlement, a copy of which is hereto annexed, to the

court of common pleas of Dauphin County, Pennsylvania, and specifies the following objections to the said settlement.

First. The said act of August 25th, 1864, imposes a tax upon the whole tonnage passing over the railroad of the said company without discriminating between freight transported through Pennsylvania in transit from a foreign country or another State, and freight in transit between points of receipt and delivery of which one is beyond the limits of Pennsylvania, as one class, and freight in transit between points of receipt and delivery both in Pennsylvania, as another class; and in thus taxing the freight mentioned in the first class, *i. e.*, that in transit from a foreign country, or another State, and that in transit between points of receipt and delivery of which one is beyond the limits of Pennsylvania, the said law is at variance with the fourth paragraph of the eighth section of the first article of the Constitution of the United States, which gives to the Congress of the United States the power to regulate commerce with foreign nations and among the several States; and with the second paragraph of the tenth section of the first article of the Constitution of the United States, which provides that no
4 State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and is for these and other reasons unconstitutional and void.

Second. By the said settlement the Philadelphia and Reading Railroad Company is charged under the said act of August 25th, 1864, with a tax of two cents per ton, or an aggregate tax of forty-six thousand five hundred and twenty dollars and four cents on two million three hundred and twenty-six thousand and two tons of freight, "the product of mines, quarries, and clay beds, in the condition in which said products were taken therefrom," which said tonnage originated in Pennsylvania on the lateral railroads in the said returns mentioned, and was transported beyond the limits of the State of Pennsylvania in manner following, viz:

One million six hundred thousand two hundred and sixty-three of said tons being freight which was transported by said Philadelphia and Reading Railroad Company over the said lateral railroads and over its own road, to the terminus of its road at Port Richmond in the city of Philadelphia, and there transshipped into boats to be so transported beyond the limits of said State. And the remaining seven hundred and twenty-five thousand seven hundred and thirty-nine of said tons being freight which was transported by said Philadelphia and Reading Railroad Company over the said lateral railroads to various points of shipment on the line of the works of The President, Directors, and Company of the Schuylkill Navigation Company, and there transshipped into the boats of the said last-named company to be so transported beyond the limits of said State. Which said lateral railroads together with the said Philadelphia and Reading Railroad form continuous lines of transportation from the places at which said one million six hundred thousand two hundred and sixty-three tons of freight originated to the said terminus, where it is transshipped as aforesaid, and together with the works of the said, The President, Directors, and Company of the Schuylkill Navigation Company, form continuous lines of transportation from the places at which said seven hundred and twenty-six thousand seven hundred and thirty-nine tons of freight originated to the various points of delivery thereof beyond the limits of the said State.

5 The said tax of forty-six thousand five hundred and twenty dollars and four cents ($46,520 04) thus charged being in viola-

tion of the provisions of the Constitution of the United States above cited, and the act imposing the same being therefore unconstitutional and void.

Third. The said act of August 25th, 1864, is unconstitutional and void to the extent that it imposes a tax upon freight other than that both received and delivered within the State of Pennsylvania.

(Signed) CHARLES E. SMITH. { SEAL OF P.&R.R.R.CO. }
President.

Attest:
(Signed)
W. H. WEBB,
Secretary.

COPY OF THE ACCOUNT.

Philadelphia and Reading Railroad Company, in account with the commonwealth of Pennsylvania, Dr.

For tax on tonnage per act of August 25, 1864, for the quarters ending December 31st, 1865, and March 31st and June 30th, 1866, as per report herewith filed.

Due Commonwealth, on settlement Dec. 16, 1865.....	$33,146 30
First class, 3,478,011 tons tax 2 c. per ton.....	69,560 22
Second class, 77,413 " " 3 c. " "	2,322 39
Third class, 259,976 " " 5 c. " "	12,998 80
	118,027 91
CR.	
By payment into the Treasury Dec. 23, 1865.....	33,146 30
Due Commonwealth.....	$84,881 41

AUDITOR GENERAL'S OFFICE, *Harrisburg, Oct. 25th*, 1866.

Settled and entered:
[L. S.]
D. C. MAURER,
For J. F. Hartranft, Auditor General.

TREASURY OFFICE, PA., *Harrisbury, Oct. 25th*, 1865.

Approved:
W. H. KEMBLE,
State Treasurer.

(Endorsed as follows, to wit:) Filed in Dauphin County, common pleas, November 19, 1866. Received and entered at the office of the Auditor General, November 19, 1866.

6 *Bond of the Philadelphia and Reading Railroad Company on appeal.*

Know all men by these presents that we, the Philadelphia and Reading Railroad Company and H. P. McKean and Jno. Ashurst are held and firmly bound unto the Commonwealth of Pennsylvania in the sum of ninety-three thousand dollars, ($93,000,) lawful money of the United States of America to be paid to the said Commonwealth for the uses,

intents and purposes declared and appointed by law, to which payment well and truly to be made, we bind ourselves our successors, heirs, executors and administrators, jointly and severally by these presents, sealed with the corporate seal of the said company and the seals of the said W. P. McKean and Jno. Ashurst, dated this 10 day of November, A. D. eighteen hundred and sixty-six (1866.)

The condition of this obligation is such that if the above bounden the Philadelphia and Reading Railroad Company shall prosecute with effect their appeal from the settlement of their account with the said commonwealth as made by the auditor general and State treasurer thereof, on the 25 day of October, 1866, and shall pay all costs
7 and charges which the court or arbitrators having jurisdiction to hear and determine said appeal, shall award against the said company as well as any sum of money which shall appear by the judgment of the said court or the award of said arbitrators to be due by the said Philadelphia and Reading Railroad Company to the said Commonwealth, then the aforegoing obligation to be void or else to be and remain in full force and virtue.

CHARLES E. SMITH,
President.

{SEAL OF THE PHILADELPHIA AND READING RAILROAD COMPANY.}

Attest:
W. H. WEBB,
Secretary.

W. P. McKEAN.
JNO. ASHURST.

Signed, sealed and delivered in presence of—
J. S. HILLES.
JAMES J. HUMPHREY.

I hereby certify that H. Pratt McKean, and John Ashurst, sureties named in the above bond are good and sufficient.

JAMES R. LUDLOW,
Judge of Com. Pl's, Phil'a Co.

(Endorsed as follows, to wit:) The Commonwealth of Pennsylvania vs. Philadelphia and Reading Railroad Co. Appeal, &c. Bond filed Nov. 17, 1866.

The within bond and sureties approved.

JNO. J. PEARSON,
President Judge.

8 *Narr.*

In Dauphin County comm'n pleas.

THE COMM'NWEALTH OF PENNSYLVANIA
vs.
PHILADELPHIA AND READING RAILROAD Company.
} No. 6. January T., 1867.

DAUPHIN COUNTY, *ss:*

The Comm'nwealth of Pennsylvania, by her attorney general, complains of the Philadelphia and Reading Railroad Company of a plea that they render unto the said Commonwealth the sum of two hundred thousand dollars, lawful money of the United States, which they owe to and unjustly detain from her. For that whereas the said defendants,

on the twenty-fifth day of October, A. D. 1866, at the County of Dauphin aforesaid, were indebted to the said plaintiff in the sum of eighty-four thousand eight hundred and eighty-one & $\frac{41}{100}$ dollars, lawful money of the United States, on an account examined, adjusted, settled, and signed by the auditor general of this Commonwealth and duly entered in the books of his office as authorized and required by law, on the 25 day of October, A. D. 1866, in which the said sum of eighty-four thousand eight hundred and eighty-one and $\frac{41}{100}$ dollars is due and owing the said plaintiff from the said defendants, with interest thereon
9 from the 25 day of January, A. D. 1867, for tax on tonnage, per act of August 25, 1864, for quarters ending Dec. 31, 1865, March 31st, and June 30, 1866, which said account was, on the 25 day of October, A. D. 1866, submitted to, revised, and approved by the State treasurer, and a copy thereof, within 30 days thereafter, sent by the said auditor general, under his hand and seal of office, to the said defendants, and which yet remains in full force against the said defendants and unappealed from. Whereby and by force of the statute in such case made and provided an action hath accrued to the said plaintiff to demand and have of and from the said defendants the sum of eighty-four thousand eight hundred and eighty-one and $\frac{41}{100}$ dollars parcel of the sum above demanded. And being so indebted, the said defendants afterwards, to wit, on the day and year aforesaid, at the county aforesaid, promised to pay to the said plaintiff, on request, the last-mentioned sum of money.

And whereas also the said defendants, on the 25 day of October, A. D. 1866, at the county aforesaid, were indebted to the said plaintiff in the further sum of eighty-four thousand eight hundred and eighty-
10 one and $\frac{41}{100}$ dollars, for money then and there had and received by the said defendants to and for the use of the said plaintiff, and also in the further sum of eighty-four thousand eight hundred and eighty-one and $\frac{41}{100}$ dollars on an account settled and entered by the auditor general of this Commonwealth against said defendants on the 25 day of October, A. D. 1866, tax on tonnage, per act of August 25, 1864, and approved by the State treasurer on the 25 day of October, A. D. 1866.

And whereas afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, the said defendants, in consideration of the premises, promised to pay the two last-mentioned several sums of money respectively to the said plaintiff on request. Yet the said defendants have disregarded their promises, and although often requested so to do, have not as yet paid any of the said several sums of money, or any part thereof, to the damage of the said plaintiff of two hundred thousand dollars, and therefore she brings suit.

B. F. ETTER,
For Benjamin Harris Brewster, Attorney General.

(Endorsed as follows:) Narr. and copy of account filed July 31, 1867.

11 *The Philadelphia and Reading Railroad Company, in account with the Commonwealth of Pennsylvania, Dr.*

For tax on tonnage, per act of August 25, 1864, for quarters ending Dec. 31, 1865, March 31st, June 30th, 1866, as per report herewith filed.

Due Commonwealth on settlement Dec. 16, 1865												$33,146	30
First class, 3,478,011	tons,	tax	2	c't	per	ton						69,560	22
Second "	77,413	"	"	3	c't	"	"					2,322	39
Third "	259,976	"	"	5	c't	"	"					12,998	80
												118,027	71

CR.

By payment into treasury Dec. 23, 1865	33,146 30
Due Commonwealth	$84,881 41

AUDITOR GENERAL'S OFFICE,
Harrisburg, Oct. 25, 1866.

Settled and entered:

{ SEAL OF THE AUDITOR GENERAL PA. }

D. C. MAURER,
For J. F. Hartranft, Auditor General.

TREASURY OFFICE, PA., *Harrisburg, Oct.* 25, 1866.

Approved:

W. H. KEMBLE,
State Treasurer.

AUDITOR GENERAL'S OFFICE,
Harrisburg, June 24, 1867.

I hereby certify that the above is a true copy of the original remaining on file in this department.

Witness my hand and the seal of office the day and year aforesaid.

D. C. MAURER,
For Auditor General.

12 In the court of common pleas of Dauphin County, Pa.

THE COMMONWEALTH OF PENNSYLVANIA
vs.
THE PHILADELPHIA AND READING RAILROAD Company.
} No. 6. January T., 1867.

JULY 31, 1867.—Enter rule on defendants to plead in 30 days' notice, or judgment. Sec. reg.

JAMES W. M. NEWLIN,
For Benjamin Harris Brewster, Att'y General.

Served July 31, 1867.

J. W. YOUNG, *Proth'y.*

And now, July 31, 1867, defendant pleads nil debet and payment.

J. C. KUNKEL,
Att'y for Def't.

13 *Notes of evidence and notes of trial.*

In Dauphin County common pleas.

THE COMMONWEALTH OF PENNSYLVANIA
vs.
PHILADELPHIA AND READING RAILROAD Company.
} No. 6, January T. 1867.

Plea: nil debet—payment.

Account as settled offered, dated October 25, 1866. Amount of tax, $84,881 41, as follows:

Philadelphia and Reading Railroad Company, in account with the Commonwealth of Pennsylvania, Dr.

For tax on tonnage per act of August 25, 1864, for the quarters ending December 31st, 1865, and March 31st, and June 30th, 1866, as per report herewith filed:

Due Commonwealth, on settlement Dec. 16, 1865.....	$33,146 30
First class, 3,478 011 tons tax 2c. per ton.....	69,560 22
Second class, 77,413 " " 3c. " "	2,322 39
Third class, 259,976 " " 5c. " "	12,998 80
	118,027 91

CR.

By payment into the treasury Dec. 23, 1865.....	33,146 30
Due Commonwealth.....	$84,881 41

AUDITOR GENERAL'S OFFICE,
Harrisburg, Oct. 25th, 1866.

Settled and entered:

[L. S.] D. C. MAURER,
For J. F. Hartranft, Auditor General.

TREASURY OFFICE, PA.,
Harrisburg, Oct. 25th, 1865.

Approved:

W. H. KEMBLE,
State Treasurer.

14 *Defense.*

The company, it is conceded, is entitled to a credit on the local tonnage $38,366 37, paid January 27, 1867, on the intra-territorial tonnage only.

Appeal and specifications read, as follows, to wit:

In the matter of the account settled by the auditor general and state treasurer of the Commonwealth of Pennsylvania between the Commonwealth of Pennsylvania and the Philadelphia and Reading Railroad for taxes claimed to be due to the said company for the quarters ending respectively December 31, 1865, March 31, 1866, and June 30th, 1866, under the provisions of the act of general assembly of the Commonwealth of Pennsylvania, approved August 25, 1864, entitled "An act to provide additional revenue for the use of the Commonwealth.

The said the Philadelphia and Reading Railroad Company appeals from the said settlement, a copy of which is hereto annexed to the court of comm'n pleas of Dauphin County, Pennsylvania, and specifies the following objections to the said settlement.

First. The said act of August 25, 1864, imposes a tax upon the
15 whole tonnage passing over the railroad of the said company without discriminating between freight transported through Pennsylvania in transit from a foreign country or another State, and freight in transit between the points of receipt and delivery, of which one is beyond the limits of Pennsylvania as one class, and freight in transit between points of receipt and delivery both in Pennsylvania as another class, and in thus taxing the freight mentioned in the first-class, *i. e.*, that in transit from a foreign country or another State, and that in transit between points of receipt and delivery, of which one is beyond the limits of Pennsylvania, the said law is at variance with the 4th paragraph of the 8th section of the first article of the Constitution of the United States, which gives to the Congress of the United States the power to regulate commerce with foreign nations, and among the several States; and with the second paragraph of the tenth section of the first article of the Constitution of the United States which provides
16 that no State shall, without the consent of Congress, lay any imposts or duties on imports, or exports, except what may be absolutely necessary for executing its inspection laws; and is for these and other reasons unconstitutional and void.

Second. By the said settlement the Philadelphia and Reading Railroad Company is charged under the said act of August 25th, 1864, with a tax of two cents per ton, or an aggregate tax of forty-six thousand five hundred and twenty dollars and four cents on two million three hundred and twenty-six thousand and two tons of freight, "the product of mines, quarries, and clay beds, in the condition in which said products were taken therefrom," which said tonnage originated in Pennsylvania on the lateral railroads in the said returns mentioned, and was transported beyond the limits of the State of Pennsylvania in manner following, viz:

One million six hundred thousand two hundred and sixty-three of said tons being freight which was transported by said Philadelphia and Reading Railroad Company over the said lateral railroads and over its own road, to the terminus of its road at Port Richmond in the city of Philadelphia, and there transshipped into boats to be so transported beyond the limits of said State. And the remaining seven hundred and twenty-five thousand seven hundred and thirty-nine of said tons being freight which was transported by said Philadelphia and Reading Railroad Company over the said lateral railroads to various points of shipment on the line of the works of The President, Directors, and Company of the Schuylkill Navigation Company, and there transshipped into the boats of said last-named company to be so transported beyond the limits of said State. Which said lateral railroads together with the said Philadelphia and Reading Railroad form continuous lines of transportation from the places at which said one million six hundred thousand two hundred and sixty-three tons of freight originated to the said terminus where it is transshipped as aforesaid, and together with the works of the said, The President, Directors, and Company of the Schuklkill Navigation Company form continuous lines of transportation from the places at which said seven hundred and twenty-six thousand seven hundred and thirty-nine tons of freight originated to the various points of delivery thereof beyond the limits of the said State.

The said tax of $46,520 04 thus charged being in violation of the provisions of Constitution of the United States above cited, and the act imposing the same being therefore unconstitutional and void.

Third. The said act of August 25, 1864, is unconstitutional and void

to the extent that it imposes a tax upon the freight other than that both received and delivered within the State of Pennsylvania.

CHARLES E. SMITH, *President.* { SEAL OF THE PHILADELPHIA AND READING R. R. CO. }

Attest:
W. H. WEBB,
Secretary.

17 *Philadelphia and Reading Railroad Company, in account with the Commonwealth of Pennsylvania, Dr.*

For tax on tonnage, per act of August 25, 1864, for quarters ending December 30, 1865, and March 31, and June 30, 1866, as per report herewith filed.

Due Commonwealth on settlement, December 16, 1865....	$33,146 30
First class, 3,478,011 tax, 2 cents per ton.....	69,560 22
Second class, 77, 413 tons, tax 3 cents per ton.....	2,322 39
Third class, 259,976 tons, tax 5 cents per ton.....	12,998 80
	118,027 71

CR.

By payment into treasury, December 23, 1865.....	33,146 30
Due Commonwealth.....	84,881 41

AUDITOR GENERAL'S OFFICE,
Harrisburg, Oct. 25, 1866.

Settled and entered:

D. C. MAURER,
For J. F. Hartranft, Auditor General.

TREASURY OFFICE, PA.,
Harrisburg, Oct. 25, 1867.

Approved and entered:

W. H. KEMBLE,
State Treasurer.

18 Returns made by the company read for the quarters ending December 31, 1865; quarter ending March 31, 1866; quarter ending June 30, 1866.

Supplementary returns for same quarters, all returned August 30, 1866, as follows, to wit:

Quarterly return of tonnage carried by the Philadelphia and Reading Railroad Company during the quarter ending Decem. 31st, 1865.

1. Number of tons of 2,000 pounds each, the product of mines, quarries, and clay beds, in the condition in which said products were taken therefrom, exclusive of that which was transported to points outside of the Commonwealth of Penn'a.....	228,179 tons.

2. Number of tons of 2,000 pounds each, of hewn timber, animal food, including live stock; aiso vegetable and other agricultural products, the value of which has not been increased by labor..... 21,530 tons.
3. Number of tons of 2,000 pounds each, of all other articles not embraced in the preceding classes..... 84,385 tons.

Included in the above return is the entire tonnage originating on the Mill Creek R. R., the Schuylkill Valley R. R., the Mount Carbon R. R., the Mount Carbon and Port Carbon R. R., the Mahanoy and Broad Mountain R. R., the Little Schuylkill R. R., the East Mahanoy R. R., the Mine Hill R. R., the Locust Gap R. R., the Lorberry Creek R. R., the Good Spring R. R., the Union R. R., and the Chester Valley R. R., all of which are worked by the Philadelphia and Reading Railroad Company.

Sworn to, June 27th, 1866.

Quarterly return of tonnage carried by the Philadelphia and Reading Railroad Company during the quarter ending March 31st, 1866.

1. Number of tons of 2,000 pounds each, the product of mines, quarries, and clay beds, in the condition in which said products were taken therefrom, exclusive of that which was transported to points outside of the Commonwealth of Penn'a..... 524,298

19 2. Number of tons of 2,000 pounds each, of hewn timber, animal food, including live stock; also vegetable and other agricultural products, the value of which has not been increased by labor..... 25,793

3. Number of tons of 2,000 pounds each, of all other articles not embraced in the preceding classes..... 85,550

Included in the above return is the entire tonnage originating on the Mill Creek Railroad, the Schulkill Valley Railroad, the Mount Carbon Railroad, the Mount Carbon and Port Carbon Railroad, the Mahanoy and Broad Mountain Railroad, the Little Schuylkill Railroad, the East Mahanoy Railroad, the Mine Hill Railroad, the Locust Gap Railroad, the Lorberry Creek Railroad, the Good Spring Railroad, the Union Railroad, and the Chester Valley Railroad, all of which are worked by the Philadelphia and Reading Railroad Company.

Sworn to, June 27th, 1866.

Quarterly return of tonnage carried by the Philadelphia and Reading Railroad Company during the quarter ending June 30th, 1866.

1. Number of tons of 2,000 pounds each, the product of mines, quarries, and clay beds, in the condition in which said products were taken therefrom, exclusive of the coal tonnage which was transported to points outside of the Commonwealth of Pennsylvania, and which is included in supplementary return made under protest..... 399,532
2. Number of tons of 2,000 pounds each, of hewn timber, animal food, including live stock; also vegetable and other agricultural products, the value of which has not been increased by labor..... 30,090
3. Number of tons of 2,000 pounds each, of all other articles not embraced in the preceding classes..... 90,041

20 Included in the above return is the entire tonnage originating

on the Mill Creek Railroad, the Schuylkill Valley Railroad, the Mount Carbon Railroad, the Port Carbon Railroad, the Mahanoy and Broad Mountain Railroad, the Little Schuylkill Railroad, the East Mahanoy Railroad, the Mine Hill Railroad, the Locust Gap Railroad, the Lorberry Creek Railroad, the Good Spring Railroad, the Union Railroad, and the Chester Valley Railroad, all of which are worked by the Philadelphia and Reading Railroad Company.

Sworn to September 12, 1866.

Supplementary quarterly return of tonnage carried by the Philadelphia and Reading Railroad Company during the quarter ending December 31st, 1866.

In compliance with the direction of the auditor general the following supplementary return is made by the Philadelphia and Reading Railroad Company, of the tonnage for the quarter ending December 31st, 1865; omitted from the return already made for that quarter, as being tonnage transported to points outside the Commonwealth of Pennsylvania. The liability of the company to pay a tax upon this tonnage is denied, as the 1st section of the act of August 25th, 1864, entitled "An act to provide additional revenue for the use of the Commonwealth," under which it is alleged to be payable, as far as it applies to the tonnage embraced within this return, is believed to be at variance with the 2d clause of the 10th section, and the 4th clause of the 8th section of the Constitution of the United States. This return is therefore made under protest against the liability of the company to pay the tax imposed by the said act of assembly.

1. Number of tons of 2,000 pounds each, the product of mines, quarries, clay beds, in the condition in which said products were taken therefrom 934,411

This and the original return for the quarter ending December 31st, 1865, includes the entire tonnage originating on the following railroads:

21 The Mill Creek Railroad, the Schuylkill Valley Railroad, the Mount Carbon Railroad, the Mount Carbon and Port Carbon Railroad, the Mahanoy and Broad Mountain Railroad, the Little Schuylkill Railroad, the East Mahanoy Railroad, the Mine Hill Railroad, the Locust Gap Railroad, the Lorberry Creek Railroad, the Good Spring Railroad, the Union Railroad, and the Chester Valley Railroad, all of which are worked by the Philadelphia and Reading Railroad Company.

The aforesaid tonnage originated in Pennsylvania, and was delivered at various points outside of the State, 616,331 tons having been transshipped into vessels at Richmond in the port of Philadelphia, the terminus of the Philadelphia and Reading Railroad, and the remaining 318,080 tons having been exported in the boats of The President, Directors, and Company of the Schuylkill Navigation Company, without transshipment, from some of the lateral railroads above mentioned.

The tonnage hereby returned as having been transported to the points beyond the State, includes all the coal that was transported from Richmond during the quarter ending December 31st, 1865, necessarily including some that reached Philadelphia on the last day of the preceding quarter and omitting some that arrived there on the last day of the quarter for which the return is made. The tonnage thus omitted is to be included in the quarter ending March 31st, 1866.

This return does not include the coal from the railroad of the Shamokin Valley Railroad Company, which passed over the road of the Phila-

delphia and Reading Railroad Company, the tax on the coal being payable by the former company.

Sworn to August 20, 1866.

Supplementary quarterly return of tonnage carried by the Philadelphia and Reading Railroad Company during the quarter ending March 31st, 1866.

In compliance with the direction of the auditor general the following supplemental return is made to the Philadelphia and Reading Railroad Company of the tonnage for the quarter ending March 31, 1866, omitted from the return already made for that quarter, as being tonnage "transported to points outside of the Commonwealth of Pennsylvania."

22 The liability of the company to pay a tax upon this tonnage is denied, as the 1st section of the act of August 25, 1864, entitled "An act to provide additional revenue for the use of the Commonwealth," under which it is alleged to be taxable, so far as it applies to the tonnage embraced within this return, is believed to be at variance with the second clause of the tenth section, and the fourth clause of the eighth section of the Constitution of the United States.

This return is therefore made under protest against the liability of the company to pay the tax imposed by the said act of assembly.

1. Number of tons of 2,000 pounds each, the product of mines, quarries, clay-beds, in the condition in which said products were taken therefrom..... 182,014

This and the original return for the quarter ending March 31, 1866, includes the entire tonnage originating on the following railroads: The Mill Creek R. R., the Schuylkill Valley R. R., the Mount Carbon R. R., the Mount Carbon and Port Carbon R. R., the Mahanoy and Broad Mountain R. R., the Little Schuylkill R. R., the East Mahanoy R. R., the Mine Hill R. R., the Locust Gap R. R., the Lorberry Creek R. R., the Good Spring R. R., the Union R. R., and the Chester Valley R. R., all of which are worked by the Philadelphia and Reading Railroad Company.

The aforesaid tonnage originated in Pennsylvania and was delivered at various points outside of the State; having been transshipped into vessels at Richmond in the port of Philadelphia, the terminus of the Philadelphia and Reading Railroad.

The tonnage hereby returned as having been transported to points beyond the State includes all the coal that was transported from Richmond during the quarter ending March 31, 1866, necessarily including some that reached Philadelphia on the last days of the preceding quarter, and omitting some that arrived there on the last days of the quarter for which the return is made; the tonnage thus omitted is to be included in the quarter ending June 30, 1866.

This return does not include the coal from the railroad of the Shamokin Valley Railroad Company, which passed over the road of the Philadelphia and Reading Railroad Company; the tax on this coal being payable by the former company.

Sworn to August 20, 1866.

23 Supplementary quarterly return of tonnage carried by the Philadelphia and Reading Railroad Company during the quarter ending June 30,1866.

In compliance with the direction of the auditor general the following supplementary return is made by the Philadelphia and Reading

Railroad Company of the tonnage for the quarter ending June 30th, 1866, omitted from the return herewith made for that quarter, as being tonnage "transported to points outside of the Commonwealth of Pennsylvania." The liability of the company to pay a tax upon this tonnage is denied, as the first section of the act of August 25, 1864, entitled "An act to provide additional revenue for the use of the Commonwealth," under which it is alleged to be taxable, so far as it applies to the tonnage embraced within this return, is believed to be at variance with the second clause of the tenth section and the fourth clause of the eighth section of the Constitution of the United States. This return is therefore made under protest against the liability of the company to pay the tax imposed by the said act of assembly.

I. Number of tons of 2,000 pounds each, the product of mines, quarries, clay-beds, in the condition in which said products were taken therefrom 1,209,577

This and the original return for the quarter ending June 30, 1866, includes the entire tonnage originating on the following railroads: the Mill Creek R. R., the Schuylkill Valley R. R., the Mount Carbon R. R., the Mount Carbon and Port Carbon R. R., the Mahanoy and Broad Mountain R. R., the Little Schuylkill R. R., the East Mahanoy R. R., the Mine Hill R. R., the Locust Gap R. R., the Lorberry Creek R. R., the Good Spring R. R., the Union R. R., and the Chester Valley R. R., all of which are worked by the Philadelphia and Reading Railroad Company.

The aforesaid tonnage originated in Pennsylvania and was delivered at various points outside of the State; 801,918 tons having been transshipped into vessels at Richmond in the port of Philadelphia, the terminus of the Philadelphia and Reading Railroad, and the remaining 407,659 tons having been transported in the boats of "The President, Directors, and Company of the Schuylkill Navigation Company," without transshipment, from some of the lateral railroads above mentioned.

The tonnage hereby returned as having been transported to points beyond the State includes all the coal that was transported from Richmond during the quarter ending June 30, 1866, necessarily including some that reached Philadelphia on the last days of the preceding quarter and omitting some that arrived there on the last days of the quarter for which the return is made; the tonnage thus omitted is to be included in the quarter ending September 30, 1866.

This return does not include the coal from the railroad of the Shamokin Valley Railroad Company, which passed over the road of the Philadelphia and Reading Railroad Company; the tax on this coal being payable by the former company.

Sworn to September 12, 1866.

Philadelphia and Reading Railroad Company, in account with the Commonwealth of Pennsylvania, Dr.

For tax on tonnage, per act of August 25, 1864, for quarters ending December 30, 1865, and March 31, and June 30, 1866, as per report herewith filed.

Due Commonwealth on settlement, December 16, 1865 ...	$33,146 30
First class, 3,478,011 tax, 2 cents per ton.....	69,560 22
Second class, 77,413 tons, tax 3 cents per ton.....	2,322 39
Third class, 259,976 tons, tax 5 cents per ton	12,998 80
	118,027 71

CR.

By payment into treasury, December 23, 1865	33,146 30
Due Commonwealth	84,881 41

AUDITOR GENERAL'S OFFICE,
Harrisburg, Oct. 25, 1866.

Settled and entered:

D. C. MAURER,
For J. F. Hartranft, Auditor General.

TREASURY OFFICE, PA.,
Harrisburg, Oct. 25, 1867.

Approved and entered:

W. H. KEEBLE,
State Treasurer.

24 W. H. WEBB, sworn:

I am secretary of the Philadelphia and Reading Railroad Company. The coal intended for exportation, carried on this road, is sent to Port Richmond. That intended for Philadelphia is sent to the city. An account is kept of all stopped at Port Richmond, destined to be there sold within the State; also of all destined to be shipped beyond the State. The account is in detail for 1866, and aggregate for 1865. The whole quantity carried to Port Richmond in 1866 was 2,292,832 tons. Of that there remained in this State 183,603 tons. All not consumed in Pennsylvania was shipped abroad to all points out of the United States. In the year 1865 there were shipped 1,996,417 tons; of that, 141,008 tons remained in Pennsylvania. The rest went abroad to other States and foreign countries.

Cross-examined:

The coal was delivered at Port Richmond to the various agents of coal operators—those who buy the coal at the mines and ship it. The most of it is dumped directly into the vessels that the agents have brought up to receive the coal—70 to 75 per cent. is delivered directly from the cars to the boats. The residue is temporarily deposited till vessels can come to receive it. Five per cent. to ten per cent. is generally screenings, some of which is sold at the ground. I think five per cent. is so sold, besides screenings five per cent., making, perhaps, ten per cent. in all. The screenings and ten per cent. are not originally destined for points out of the State, and separate rates of freight are charged on that coal. We have two rates—one on that to be exported, the other on that to be sold for home consumption. That ten per cent. is already returned as coal to be delivered within the State, and the tax is paid on it. That is returned as local.

JOHN TUCKER, sworn:

I have been connected with the Philadelphia and Reading Railroad Company since 1843. The wharves at Richmond were built to export coal from this State. Last year there were carried three millions and seven hundred odd thousand tons. 2,200,000 of that were exported. That is the proportion that the quantity exported bears to that consumed at home. At Richmond there are twenty-one large wharves. Branches run to the main line of the road. Cars are run to the wharves,

and, if vessels are there to receive it, the coal is shot directly from the cars into the vessels. If there are none, it is temporarily deposited on the wharves till vessels come. Besides there are yards expressly prepared for retailing coal. Wharves extend out—500 feet to the end of the wharf. I am familiar with the course of the coal trade. A very small proportion is sold at Richmond. There are two classes of shippers—one mine, the others buy and sell. Both classes sell before the coal leaves the mines. One firm contracted for 500,000 tons, to be delivered out of the State, before a ton was mined. Must sell before it arrives, or the wharves would be filled and trade blocked. If any coal is deposited, it is the accident of trade by vessels not coming in. That destined for the wharves at Richmond is charged at a lower rate to compete with other companies. The wharves belong to the company, and no charge is made for their use. They are not storehouses, but destined for the use of shipping. The company also owns many vessels to ship abroad. The retail trade at Richmond has grown up since the company's business was established there. The orders for shipment are always in advance of the supply. One day's carriage would fill the wharves if the coal were not removed. If any is sold at Richmond, it is charged an extra price for transportation. That delivered through the Schuylkill canal is destined for exportation. They have wharves, as we, and coal is transported directly from cars to the boat. Coal is not sold at the end of the lateral road. It is started to go through, and is destined for shipment abroad from the beginning. Their system of shipping and loading is the same as that of the Philadelphia and Reading Railroad at Richmond. The main object of all is to ship abroad.

In Dauphin County common pleas.

THE COMMONWEALTH OF PENNSYLVANIA *vs.* THE PHILADELPHIA AND READING RAILROAD Company. } No. 67. January T., 1867.

Charge to the jury.

PEARSON, P. J.

The Philadelphia and Reading Railroad is used for the transportation of coal, &c., from Schuylkill county and other localities to the city of Philadelphia. It neither owns mines nor carries on the business of mining, but is merely a carrier. In the first two quarters of the year 1866 the company transported over its road, of the three classes described in the act of April 30, 1864, 3,815,390 tons of freight. Of this, it is conceded that were taken up and delivered within the State of Pennsylvania, whilst were carried on the road for the original purpose, as is claimed, of being sent abroad to other States or foreign countries, and was directly transferred from the cars to vessels for shipment, and was so transported. It is conceded that all of the taxes on articles received and delivered within the State has been paid, but the State claims to charge the company with a tax on all of its tonnage carried over the road, without regard to its original place of destination, amounting in the aggregate to $46,520. The account has been so settled at the treasury department, from which the company has appealed.

The first section of the act of April 30, 1864, with its supplement, passed on the 25th of August, 1864, as we understand it, imposes a tax

of two, three, and five cents per ton on each ton of certain described articles transported by any company doing business within this Commonwealth, whether over a railroad, canal, slack-water, or natural navigation, or which is permitted to be transported over the works of such company for toll, except turnpike, plank road, or bridge companies. This embraces every kind of transportation, in steamboats on our
27 lakes and rivers, on railroads or canal, &c., provided either the carrier is a company or the road or canal belongs to one, and includes all goods carried from one State through Pennsylvania to another beyond our borders, or from a foreign country through our State to one in the interior.

The meaning of the act is very clear, and the only question raised is as to its constitutionality. The first case in which the validity of this statute was presented for our consideration, was that of The Commonwealth vs. The Erie Railway Company, a corporation created by the State of New York, but which passed, for a few miles, within the State of Pennsylvania. This court then held that the tax imposed on that company for carrying goods through our State from and to points beyond our borders was in plain violation of the Constitution of the United States, and that the tax could not be collected.

No other point was there raised, except the right to tax the commodities of other States in transit through this State, or to tax the railroad company which carried them. Soon after, another question was presented in an appeal taken by the Delaware, Lackawanna, and Western Railroad Company on account of a tax imposed under the same statute, on its tonnage, for goods taken up within the State of Pennsylvania and transported directly into other States, such being the original design of the carriers. We then decided that the tax thus attempted to be collected was illegal, as interfering with and restricting the free commerce and intercourse between the States, and that the statute, as thus applied, was in conflict with the Federal Constitution. Full and elaborate opinions were delivered in both cases, and we shall not now repeat our reasons there given, but refer to them as our exposition of the law. Writs of error were taken in both cases, but never argued, as they were considered correctly decided by the then attorney general, Mr. Meredith. Some new positions have been assumed by the counsel for the Commonwealth, supposed not to have been sufficiently considered and investigated in our former opinions: First. That, as Congress has never enacted any law regulating the commerce between the States, there is nothing in the way of State action on the subject. Second. The tax imposed by the Pennsylvania statute is not on the goods transported into other States or foreign countries, but on the company itself as a carrier. There is no lien on the articles transported, but the claim is against the corporation through whose means they are transported. Third. The act does not impose a tax on the goods, but on the profits or income of a corporation created by our own laws and transacting its business within our borders. Expressions to be found in some of the decided cases, or dicta used in the opinions of some of the United States judges, might lead to the belief that, until Congress had exercised its power to regulate the commerce between the States, it might be
28 done by the States themselves. We consider it now settled, that no State can impose a burden or duty on any commodity coming from another State within its borders, or passing beyond its boundaries into another State. It certainly could not upon foreign imports or exports, and the power to regulate the foreign commerce of the country is to be found in the same section as that between the States. No jurist

will pretend that a State could impose a duty on the imports from foreign countries, although Congress has failed to impose any. It would be an evidence that none was proper, as has been repeatedly said in regard to the regulating of commerce between the States. The failure to act proves that Congress considered no regulation was called for, and that the trade should be free and untram'elled. Judge M'Lean, in 7 Howard, 394–'5 and 398–'9, 400, declares that it is the same as with foreign nations, and is necessarily exclusive.

Such is the opinion of Judge Baldwin in Groves vs. Slaughter, 15 Peters, 511; of Judge Story, in New York vs. Miller, 11 Peters, 158. To lay an export duty on the commodities of any State even transcends the power of Congress. (See No. 5, sect. 9 of first article.) This contest would seem to be put at rest by the unanimous opinions of the Supreme Court of the United States in Almy vs. California, 24 Howard, 169, where there was an attempt to tax the bill of lading of gold exported. The power of the State was denied, and Ch. J. Taney says that if this was an attempt to tax the gold itself, it would be seen at once, and conceded by all to be inadmissible. We are unable to see any distinction between taxing the exportation of gold or coal, timber or other products. Although the inability of the State to impose a tax on passengers coming into the State was decided by a divided court in 7 Howard, yet we find a more modern case settled by the same tribunal with great unanimity in Crandal vs. The State of Nevada, where it was held that the State could not impose a tax on a stage company for each passenger carried into or out of the State in their coaches. That, too, like the present, was not a tax on the passenger, but on the carrier. These decisions also answer and overturn the second position assumed on the part of the Commonwealth.

Third. This is not a tax on the income of the company, but on each ton of coal transported.

There is no doubt but that a tax on the income of the company created under the laws, and carrying on business within the State of Pennsylvania, would be valid. So also might be one on the net profits of the business; but this does not purport to be a tax on the business, but on the tonnage transported, whether carried at a profit or a loss. The tax, though nominally on the carrier, is really on the commodity carried, is such an impost or duty as might prevent its transportation abroad, for if the State can tax the company two cents per ton, it may tax it two dollars. It is no more a tax on the mere business than
29 was that imposed on the gold manifest, or on the stage company for each passenger carried. It is said in the argument that many of the cases were decided because the legislature discriminated between the internal and external trade of the State. That is not the general ground of decision; for, whilst it is conceded that a State may impose any amount of tax on their intra-territorial trade, it can levy nothing on that which comes to, goes from, or passes through its borders, as thereby the burden is imposed on citizens of other States. We are, it is contended, bound by what *it* said by our own supreme court in The Pennsylvania Railroad Company vs. The Commonwealth of Pennsylvania, 3 Grant's cases, 129.

In the first place, that was, in our opinion, no question of taxation, and, in the second place, if it were, it is not binding on this court. When the contest arises under the Constitution of the United States we must be governed by the decisions of the Federal judiciary alone. They are paramount. Some of the questions then open are since settled. This court decided the tonnage-tax case, as it was called, on the

ground that it was not a tax, but a contract. The corporation, as a bonus for its charter, agreed to pay the State, as a bonus, a certain sum per ton for freight transported on its road. This was not a regulation of commerce, but an agreement between the parties, and had no greater effect than if the proposed artificial person had contracted to pay a gross sum of money, or a certain annual sum, for leave to construct its road through the State. It was not proved that any addition was made to the freight by reason of the tax; on the contrary, the company carried freight brought from beyond our borders at a lower rate than that imposed on the domestic trade of the same character. It clearly appeared that the charge, called a tax, fell on the corporation itself, as it was designed it should, and not on the outside transporters. We cannot doubt the power of the parties to enter into such a contract, which is a mutual agreement between them, whilst a tax is in the nature of a command proceeding from the sovereign to the subject. By taxation commerce may be regulated, burdened, or entirely interdicted.

We instruct you that all freight transported on the defendant's road, which was designed and intended to seek a market within the State, is subject to the tax imposed by the first section of the act of April 30, 1864. That it will be presumed to be so intended until the contrary is shown. Therefore where freight is loaded on the cars of the company and brought to Richmond or any other point, for sale, it is subject to the tax, although it may be sold to be shipped abroad. When the article is sold for foreign shipment, before being loaded on the defendant's cars, is then placed thereon and carried directly to the point of tran'shipment, loaded on vessels, and actually sent into other States or foreign countries, the railroad company is not bound to pay any tax on such tonnage. To apply the act of assembly to such tonnage would be a burden on the commerce of the State to which it is to be carried, and thus far a regulation of commerce between the States, in violation of the Federal compact, and the statute cannot be so construed without rendering it unconstitutional. You will, therefore, render your verdict in favor of the defendant for all taxes charged on the tonnage carried on the road originally destined for other States or foreign countries, and so sent, and in favor of the Commonwealth for all other taxes thereon, if not already paid. To this charge the Commonwealth, by its counsel, did except, and, at his request, this bill of exception sealed.

JNO. J. PEARSON. [SEAL.]

(Endorsed as follows:) Notes and charge of the court filed May 4, 1868.

30 In the supreme court of Pennsylvania, in and for the middle district, set:

{ SEAL OF THE SUPREME COURT OF PENNSYLVANIA, MID. DIST. } The Commonwealth of Pennsylvania, to the justices of the court of common pleas for the county of Dauphin, greeting:

Because in the record and process, and in rendering the judgment in a certain plaint which was in our said court, before the judges of the same court, by our writ between The Commonwealth of Pennsylvania, plaintiff in error, and The Philadelphia and Reading Railroad Company, defendant in error, as it is said, manifest error hath intervened, to the great damage of the said plaintiff in error, as by the complaint of the same plaintiff in error we have received information, we, willing that if any error be therein, it should be corrected, and that speedy

justice be done to the parties in this part, do command you that, if judgment, as it is said, be rendered in the said plea, then the record and process and all things touching the same, under your seals, distinctly and openly, you have before the justices of our supreme court of Pennsylvania, at a supreme court to be held at Harrisburg, in and for the middle district of said Commonwealth, on the 3d Monday of May next, and this writ; that the record and process aforesaid being inspected, we may further cause to be done what of right and according to our laws and customs ought.

Witness the Honorable James Thompson, chief justice of our said supreme court, at Harrisburg, the 2nd day of April, in the year of our Lord one thousand eight hundred and 68, and of the Commonwealth .

WALLACE DEWITT,
Prothonotary.

Allowed.

The record and process, and all things touching the same, so full and entire as before us they remain, to the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the middle district, we certify and send as within we are commanded.

JNO. J. PEARSON. [L. S.]

(Indorsed:) No. 68. May term, 1868. Supreme court of Pennsylvania, middle district. The Commonwealth of Pennsylvania, plaintiff in error, vs. The Philadelphia and Reading Railroad Company, defendant in error. Writ of error to the court of common pleas for the county of Dauphin. Returnable the 3d Monday of May, 1869. Rule on the defendant in error to appear and plead on the return day of the writ.

"N. B.—20 days' notice to the parties or their counsel below is necessary to compel an appearance."

W. DEWITT, *Proth'y.*

Filed in Dauphin common pleas, April 3, 1868.

JOS. H. NISSLEY, *Proth'y.*

31 In the supreme court of Pennsylvania, in and for the middle district.

At a supreme court of the State of Pennsylvania, in and for the middle district, begun and held at the city of Harrisburg, on the first Monday of May, A. D. 1869. Present, the Honorable James Thompson, chief justice of the supreme court of Pennsylvania, John M. Read, Daniel Agnew, George Sharswood, and Henry W. Williams, justices, and Wallace De Witt, prothonotary, among the records of the said supreme court of Pennsylvania, in and for said middle district to May term, is contained as follows, to wit:

Writ of error to the court of common pleas of Dauphin County.

THE COMMONWEALTH OF PENNSYLVANIA, plaintiff in error, plaintiff below,
vs.
THE PHILADELPHIA AND READING RAILroad Company, defendant in error, defendant below.
} Of May term, 1868, No. 68.

32 *Docket entries.*

Pr'ecipe for writ of error filed April 2, 1868; writ of error to the court

of common pleas of Dauphin County, issued April 2, 1868, returnable 3 Monday of May, 1869.

Assignment of errors filed by the plaintiff in error May 18, 1869.

Continued May 18, 1869.

Writ of error returned with record from the court of common pleas of Dauphin County, and filed May 19, 1869.

Called for argument and heard May 19, 1869.

And now, to wit, July 6, 1870, the judgment of the court of common pleas of Dauphin County is reversed, and writ of venire facias de novo awarded.

Per curiam.

THOMPSON, C. J.

NOVEMBER 17, 1869.—Record and judgment of the supreme court remitted to court of common pleas of Dauphin County.

Certified from the record.

{ SEAL OF THE SUPREME COURT OF PENNSYLVANIA, MID. DIS'T. }

WALLACE DEWITT,
Prothonotary.

33 *Pr'ecipe for writ of error.*

In the supreme court of Pennsylvania, in and for the middle district.

THE COMMONWEALTH OF PENNSYLVANIA, plaintiff in error, plaintiff below,
vs.
THE PHILADELPHIA AND READING RAILroad Company.

In Dauphin County common pleas. No. 6, January term, 1867.

Issue writ of error to the court of common pleas of Dauphin County, returnable at May term, 1868.

BENJAMIN HARRIS BREWSTER,
Attorney General.

To WALLACE DE WITT,
Prothonotary.

(Endorsed as follows:) Filed in supreme court, April 2, 1868. Wallace De Witt, prothonotary.

34 *Assignments of error filed by the plaintiff in error.*

In the supreme court of Pennsylvania. No. 68, May term, 1868, mid. dis't.

THE COMMONWEALTH OF PENNSYLVANIA, plaintiff in error, plaintiff below,
vs.
THE PHILADELPHIA AND READING RAILroad Company, defendant in error.

Assignments of error.

First. The court erred in charging that the tax imposed by the acts

of April 30 and August 25, 1864, was a tax upon the goods transported, and not upon the carrier, and that the same was void as a regulation of commerce between the States.

Second. The court erred in charging that the said tax was not imposed upon the business or upon the profits of the defendants.

Third. The court erred in charging the said acts of April 30 and August 25, 1864, to be unconstitutional, in so far as they impose a tax on tonnage other than that both received and delivered within Pennsylvania.

(Endorsed as follows:) Filed May 18, 1870. Wallace De Witt, pro-thonotary.

35 MIDDLE DISTRICT OF PENNSYLVANIA, *set:*

THE COMMONWEALTH OF PENNSYLVANIA, plaintiff in error,
vs.
THE PHILADELPHIA AND READING RAILroad Company, defendant in error.

SEAL OF THE SUPREME COURT OF PENNSYLVANIA, MID. DIST.

The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Dauphin, greeting:

Whereas, by virtue of our writ of error from our supreme court of Pennsylvania in and for the middle district, returnable in the said court on the third Monday of May, in the year of our Lord one thousand eight hundred and sixty-nine, a record was brought into the same court of a judgment rendered against The Commonwealth of Pennsylvania, plaintiff in error, at the suit of The Philadelphia and Reading Railroad Company, defendant in error. And it was so proceeded in our supreme court that the said judgment was reversed, and writ of venire facias de novo awarded, and the record and proceedings thereupon, and all things concerning the same, were (agreeably to the directions of the act of assembly in such cases made and provided) ordered by the said supreme court to be remitted to the court of common pleas, for the county of Dauphin aforesaid, as well for execution or otherwise as to justice shall appertain: Wherefore we remit you the record of the judgment aforesaid and the proceedings thereupon, in order for execution or otherwise, as aforesaid.

Witness the Hon. James Thompson, chief justice of our supreme court, at Harrisburg, the 17th day of November, in the year of our Lord one thousand eight hundred and 69.

WALLACE DEWITT,
Prothonotary.

(Indorsed:) No. 68. May term, 1868. Supreme court of Pennsylvania, middle district. The Commonwealth of Pennsylvania, plaintiff in error, vs. The Philadelphia and Reading Railroad Company, defendant in error. Remittitur. Filed in Dauphin common pleas, Nov. 24, 1869. Jno. H. Nissley, Proth'y.

36 Among the records of the court of common pleas of Dauphin County, Penn'a, to January term, 1867, No. 6, it is contained as follows, to wit:

Docket entry.

THE COMMONWEALTH OF PENNSYLVANIA
vs.
PHILADELPHIA AND READING RAILROAD COMPANY.

Appeal by defendants from the settlement of the auditor general and State treasurer.

Nov. 29, 1866, appeal and specifications filed; same day bond filed.
July 31, 1867, narr. and copy of account filed; same day, rule on defendant to plead on thirty days' notice or judgment; and same day defendant pleads "nil debet & payment."
November term, 1867, on issue list, continued.
December adjourned court, 1867, on issue list.
December 17, 1867, trial ordered, jury called, come, &c., twelve good and lawful men of the county of Dauphin, duly selected and summoned, &c., who being duly sworn and affirmed according to law, do say—Dec. 17, 1867—that they find in favor of the defendants.
April 3, 1868, writ of error from supreme court received and filed.
May 4, 1868, notes and charge of the court filed; same day judgment on the verdict.
Nov. 24, 1869, record from the supreme court received, and filed with a certificate that the judgment of the court of common pleas aforesaid is reversed, and a venire de novo awarded.
January court, 1870, on issue list.
37 January 27, 1870, trial ordered, jury called, came, &c., twelve good and lawful men of the county of Dauphin, duly selected, summoned returned, &c., who being all sworn or affirmed, according to law, do say that they find in favor of the plaintiff the sum of fifty-four thousand eight hundred twenty-nine $\frac{99}{100}$ dollars, ($54,829 99.)
February 1, 1870, judgment on the verdict.
April 9, 1870, writ of error from the supreme court received and filed.
April 18, 1870, notes, points, and charge filed.

SEAL OF THE COURT OF COMMON PLEAS OF DAUPHIN CO., PA.

Certified from the record April 21, 1870.
JOS. H. NISSLEY,
Proth'y.

38 NOTES OF TRIAL, POINTS, AND CHARGE OF THE COURT.

In the court of common pleas of Dauphin County, No. 6. January T., 1867.

THE COMMONWEALTH OF PENNSYLVANIA
vs.
THE PHILADELPHIA AND READING RAILROAD Company.

Appeal.—Notes of trial.

Report read, dated 27 June, 1866, & for quarter ending Dec. 31, 1865. Pro-ut paper read as follows, to wit:

39 Quarterly return of tonnage carried by the Philadelphia and Reading Railroad Company during the quarter ending Decem. 31st, 1865.

1. Number of tons of 2,000 pounds each, the product of

mines, quarries, and clay beds, in the condition in which said products were taken therefrom, exclusive of that which was transported to points outside of the Commonwealth of Penna..... 228. 179 tons.

2. Number of tons of 2,000 pounds each, of hewn timber, animal food, including live stock; also vegetable and other agricultural products, the value of which has not been increased by labor..... 21. 530 tons.

3. Number of tons of 2,000 pounds each, of all other articles not embraced in the preceding classes..... 84. 385 tons.

Included in the above return is the entire tonnage originating on the Mill Creek R. R., the Schuylkill Valley R. R., the Mount Carbon R. R., the Mount Carbon and Port Carbon R. R., the Mahanoy and Broad Mountain R. R., the Little Schuylkill R. R., the East Mahanoy R. R., the Mine Hill R. R., the Locust Gap R. R., the Lorberry Creek R. R., the Good Spring R. R., the Union R. R., and the Chester Valley R. R., all of which are worked by the Philadelphia and Reading Railroad Company.

Sworn to June 27th, 1866.

40 Report of same date, for quarter ending March 31, 1866. Pro-ut paper read as follows, to wit:

41 Quarterly return of tonnage carried by the Philadelphia and Reading Railroad Company during the quarter ending March 31st, 1866.

1. Number of tons of 2,000 pounds each, the product of mines, quarries, and clay-beds, in the condition in which said products were taken therefrom, exclusive of that which was transported to points outside of the Commonwealth of Penn'a 524,298

2. Number of tons of 2,000 pounds each, of hewn timber, animal food, including live stock; also vegetable and other agricultural products, the value of which has not been increased by labor 25,793

3. Number of tons of 2,000 pounds each, of all other articles not embraced in the preceding classes 85,550

Included in the above return is the entire tonnage originating on the Mill Creek Railroad, the Schuylkill Valley Railroad, the Mount Carbon Railroad, the Mount Carbon and Port Carbon Railroad, the Mahanoy and Broad Mountain Railroad, the Little Schuylkill Railroad, the East Mahanoy Railroad, the Mine Hill Railroad, the Locust Gap Railroad, the Lorberry Creek Railroad, the Good Spring Railroad, the Union Railroad, and the Chester Valley Railroad, all of which are worked by the Philadelphia and Reading Railroad Company.

Sworn to June 27th, 1866.

42 Report dated Dec. 12, 1866, for quarter ending June 30, 1866. Pro-ut same as follows, to wit:

43 Quarterly return of tonnage carried by the Philadelphia and Reading Railroad Company during the quarter ending June 30th, 1866.

1. Number of tons of 2,000 pounds each, the product of mines, quarries, and clay-beds, in the condition in which said pro-

ducts were taken therefrom, exclusive of the coal tonnage which was transported to points outside of the Commonwealth of Pennsylvania, and which is included in supplementary return made under protest 399,532

2. Number of tons of 2,000 pounds each, of hewn timber, animal food, including live stock; also vegetable and other agricultural products, the value of which has not been increased by labor 30,090

3. Number of tons of 2,000 pounds each, of all other articles not embraced in the preceding classes 90,041

Included in the above return is the entire tonnage originating on the Mill Creek Railroad, the Schuylkill Valley Railroad, the Mount Carbon Railroad, the Port Carbon Railroad, the Mahanoy and Broad Mountain Railroad, the Little Schuylkill Railroad, the East Mahanoy Railroad, the Mine Hill Railroad, the Locust Gap Railroad, the Lorberry Creek Railroad, the Good Spring Railroad, the Union Railroad, and the Chester Valley Railroad, all of which are worked by the Philadelphia and Reading Railroad Company.

Sworn to September 12, 1866.

44 Supplemental returns for same quarters, dated 20 August, 1866, read as follows, to wit:

45 Supplementary quarterly return of tonnage carried by the Philadelphia and Reading Railroad Company during the quarter ending December 31st, 1865.

In compliance with the direction of the auditor general the following supplementary return is made by the Philadelphia and Reading Railroad Company, of the tonnage for the quarter ending December 31st, 1865, omitted from the return already made for that quarter, as being tonnage transported to points outside the Commonwealth of Pennsylvania. The liability of the company to pay a tax upon this tonnage is denied, as the 1st section of the act of August 25th, 1864, entitled "An act to provide additional revenue for the use of the Commonwealth," under which it is alleged to be payable, as far as it applies to the tonnage embraced within this return, is believed to be at variance with the 2d clause of the 10th section, and the 4th clause of the 8th section of the Constitution of the United States. This return is, therefore, made under protest against the liability of the company to pay the tax imposed by the said act of assembly.

1. Number of tons of 2,000 pounds each, the product of mines, quarries, clay-beds, in the condition in which said products were taken therefrom 934,411

This and the original return for the quarter ending December 31st, 1865, includes the entire tonnage originating on the following railroads: The Mill Creek Railroad, the Schuylkill Valley Railroad, the Mount Carbon Railroad, the Mount Carbon and Port Carbon Railroad, the Mahanoy and Broad Mountain Railroad, the Little Schuylkill Railroad, the East Mahanoy Railroad, the Mine Hill Railroad, the Locust Gap Railroad, the Lorberry Creek Railroad, the Good Spring Railroad, the Union Railroad, and the Chester Valley Railroad, all of which are worked by the Philadelphia and Reading Railroad Company.

The aforesaid tonnage originated in Pennsylvania, and was delivered at various points outside of the State, 616,331 tons having been trans-

shipped into vessels at Richmond, in the port of Philadelphia, the terminus of the Philadelphia and Reading Railroad, and the remaining 318,080 tons having been exported in the boats of The President, Directors, and Company of the Schuylkill Navigation Company, without transshipment, from some of the lateral railroads above mentioned.

The tonnage hereby returned as having been transported to the points beyond the State, includes all the coal that was transported from Richmond during the quarter ending December 31st, 1865, necessarily including some that reached Philadelphia on the last day of the preceding quarter, and omitting some that arrived there on the last day of the quarter, for which the return is made. The tonnage thus omitted is to be included in the quarter ending March 31st, 1866.

This return does not include the coal from the railroad of the Shamokin Valley Railroad Company, which passed over the road of the Philadelphia and Reading Railroad Company, the tax on the coal being payable by the former company.

Sworn to August 20, 1866.

46 Supplemental return of same date, read as follows, to wit:

47 Supplementary quarterly return of tonnage carried by the Philadelphia and Reading Railroad Company during the quarter ending March 31st, 1866.

In compliance with the direction of the auditor general the following supplemental return is made to the Philadelphia and Reading Railroad Company of the tonnage for the quarter ending March 31, 1866, omitted from the return already made for that quarter, as being tonnage "transported to points outside of the Commonwealth of Pennsylvania." The liability of the company to pay a tax upon this tonnage is denied, as the 1st section of the act of August 25, 1864, entitled "An act to provide additional revenue for the use of the Commonwealth" under which it is alleged to be taxable, so far as it applies to the tonnage embraced within this return, is believed to be at variance with the second clause of the tenth section, and the fourth clause of the eighth section of the Constitution of the United States.

This return is therefore made under protest against the liability of the company to pay the tax imposed by the said act of assembly.

I. Number of tons of 2,000 pounds each, the product of mines, quarries, clay-beds, in the condition in which said products were taken therefrom..... 182,014.

This and the original return for the quarter ending March 31, 1866, includes the entire tonnage originating on the following railroads: The Mill Creek R. R., the Schuylkill Valley R. R., the Mount Carbon R. R., the Mount Carbon and Port Carbon R. R., the Mahanoy and Broad Mountain R. R., the Little Schuylkill R. R., the East Mahanoy R. R., the Mine Hill R. R., the Locust Gap R. R., the Lorberry Creek R. R., the Good Spring R. R., the Union R. R., and the Chester Valley R. R., all of which are worked by the Philadelphia and Reading Railroad Company.

The aforesaid tonnage originated in Pennsylvania and was delivered at various points outside of the State; having been transshipped into vessels at Richmond in the port of Philadelphia, the terminus of the Philadelphia and Reading Railroad.

The tonnage hereby returned as having been transported to points beyond the State includes all the coal that was transported from Richmond during the quarter ending March 31, 1866, necessarily including

some that reached Philadelphia on the last days of the preceding quarter, and omitting some that arrived there on the last days of the quarter for which the return is made; the tonnage thus omitted is to be included in the quarter ending June 30, 1866.

This return does not include the coal from the railroad of the Shamokin Valley Railroad Company, which passed over the road of the Philadelphia and Reading Railroad Company; the tax on this coal being payable by the former company.

(Sworn to August 20, 1866.)

48 Supplemental report dated September 12, 1866, read as follows, to wit:

49 Supplementary quarterly return of tonnage carried by the Philadelphia and Reading Railroad Company during the quarter ending June 30, 1866.

In compliance with the direction of the auditor general the following supplementary return is made by the Philadelphia and Reading Railroad Company of the tonnage for the quarter ending June 30th, 1866, omitted from the return herewith made for that quarter, as being tonnage "transported to points outside of the Commonwealth of Pennsylvania." The liability of the company to pay a tax upon this tonnage is denied, as the first section of the act of August 25, 1864, entitled "An act to provide additional revenue for the use of the Commonwealth," under which it is alleged to be taxable, so far as it applies to the tonnage embraced within this return, is believed to be at variance with the second clause of the tenth section and fourth clause of the eighth section of the Constitution of the United States. This return is therefore made under protest against the liability of the company to pay the tax imposed by the said act of assembly.

I. Number of tons of 2,000 pounds each, the product of mines, quarries, clay-beds, in the condition in which said products were taken therefrom.....1,209,577

This and the original return for the quarter ending June 30, 1866, includes the entire tonnage originating on the following railroads: the Mill Creek R. R., the Schuylkill Valley R. R., the Mount Carbon R. R., the Mount Carbon and Port Carbon R. R., the Mahanoy and Broad Mountain R. R., the Little Schuylkill R. R., the East Mahanoy R. R., the Mine Hill R. R., the Locust Gap R. R., the Lorberry Creek R. R., the Good Spring R. R., the Union R. R., and the Chester Valley R. R., all of which are worked by the Philadelphia and Reading Railroad Company.

The aforesaid tonnage originated in Pennsylvania, and was delivered at various points outside of the State; 801,918 tons having been transshipped into vessels at Richmond and the port of Philadelphia, the terminus of the Philadelphia and Reading Railroad, and the remaining 407,659 tons having been transported in the boats of "The President, Directors and Company of the Schuylkill Navigation Company" without transshipment, from some of the lateral railroads above mentioned.

The tonnage hereby returned as having been transported to points beyond the State includes all the coal that was transported from Richmond during the quarter ending June 30, 1866, necessarily including some that reached Philadelphia on the last days of the preceding quarter and omitting some that arrived there on the last days of the quarter for which the return is made; the tonnage thus omitted is to be included in the quarter ending September 30, 1866.

This return does not include the coal from the railroad of the

Shamokin Valley Railroad Company, which passed over the road of the Philadelphia and Reading Railroad Company; the tax on this coal being payable by the former company.

(Sworn to September 12, 1866.)

50 Settlement made, Oct. 25, 1866. Read pro-ut paper as follows, to wit:

51 *Philadelphia and Reading Railroad Company, in account with the Commonwealth of Pennsylvania, Dr.*

For tax on tonnage per act of August 25, 1864, for the quarters ending December 31st, 1865, and March 31st, and June 30th, 1866, as per report herewith filed.

Due Commonwealth, on settlement Dec. 16, 1865	$33,146 30
First class, 3,478,011 tons tax 2 c. per ton.....	69,560 22
Second class, 77,413 " " 3 c. " "	2,322 39
Third class, 259,976 " " 5 c. " "	12,998 80
	118,027 91

Cr.

By payment into the treasury, Dec. 23, 1865.....	33,146 30
Due Commonwealth.....	$84,881 41

AUDITOR GENERAL'S OFFICE,
Harrisburg, Oct. 25th, 1866.

Settled and entered.
[L. S.]

D. C. MAURER,
For J. F. Hartranft, Auditor General.

TREASURY OFFICE, PA., *Harrisburg, Oct. 25th, 1865.*

Approved.

W. H. KEMBLE, *State Treasurer.*

52 It is conceded that the company is entitled to a credit for the local tonnage amounting to $38,366 37, paid January 27, 1867, on the intra-territorial tonnage only.

Plaintiff rests.

Defence.

Specifications read from the former notes of testimony, pro-ut the same, as follows, to wit.

53 In the matter of the account settled by the auditor general and state treasurer of the Commonwealth of Pennsylvania, between the Commonwealth of Pennsylvania, and the Philadelphia and Reading Railroad Company for taxes claimed to be due to the said Commonwealth, for the quarters ending respectively, December 31st, 1865, March 31st, 1866, and June 30th, 1866, under the provisions of the act of the general assembly of the Commonwealth of Pennsylvania, approved August 25th, 1864, entitled, "An act to provide additional revenue for the use of the Commonwealth."

The said the Philadelphia and Reading Railroad Company appeals

from the said settlement, a copy of which is hereto annexed, to the court of common pleas of Dauphin County, Pennsylvania, and specifies the following objections to the said settlement.

First. The said act of August 25th, 1864, imposes a tax upon the whole tonnage passing over the railroad of the said company without discriminating between freight transported through Pennsylvania in transit from a foreign country or another State, and freight in transit between points of receipt and delivery of which one is beyond the limits of Pennsylvania, as one class, and freight in transit between points of receipt and delivery, both in Pennsylvania, as another class; and in thus taxing the freight mentioned in the first class, i. e., that in transit from a foreign country, or another State, and that in transit between points of receipt and delivery, of which one is beyond the limits of Pennsylvania, the said law is at variance with the fourth paragraph of the eighth section of the first article of the Constitution of the United States, which gives to the Congress of the United States the power to regulate commerce with foreign nations and among the several States; and with the second paragraph of the tenth section of the first article of the Con-
54 stitution of the United States, which provides that no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and is for these and other reasons unconstitutional and void.

Second. By the said settlement the Philadelphia and Reading Railroad Company is charged under the said act of August 25th, 1864, with a tax of two cents per ton, or an aggregate tax of forty-six thousand five hundred and twenty dollars and four cents on two million three hundred and twenty-six thousand and two tons of freight, "the product of mines, quarries, and clay beds, in the condition in which said products were taken therefrom," which said tonnage originated in Pennsylvania on the lateral railroads in the said returns mentioned, and was transported beyond the limits of the State of Pennsylvania in manner following, viz:

One million six hundred thousand two hundred and sixty three of said tons being freight which was transported by said Philadelphia and Reading Railroad Company over the said lateral railroads and over its own road, to the terminus of its road at Port Richmond in the city of Philadelphia, and there transshipped into boats to be so transported beyond the limits of said State. And the remaining seven hundred and twenty-five thousand seven hundred and thirty-nine of said tons being freight which was transported by said Philadelphia and Reading Railroad Company over the said lateral railroads to various points of shipment on the line of the works of The President, Directors, and Company of the Schuylkill Navigation Company, and there transshipped into the boats of said last-named company, to be so transported beyond the limits of said State. Which said lateral railroads, together with the said Philadelphia and Reading Railroad, form continuous lines of transportation from the places at which said one million six hundred thousand two hundred and sixty-three tons of freight originated to the said terminus, where it is transshipped as aforesaid, and together with the works of the said The President, Directors, and Company of the Schuylkill Navigation Company, form continuous lines of transportation from the places at which said seven hundred and twenty-six thousand seven hundred and thirty-nine tons of freight originated to the various points of delivery thereof beyond the limits of the said State.

55 The said tax of forty-six thousand five hundred and twenty dollars and four cents, ($46,520 04,) thus charged, being in viola-

tion of the provisions of the Constitution of the United States, above cited, and the act imposing the same being therefore unconstitutional and void.

Third. The said act of August 25th, 1864, is unconstitutional and void to the extent that it imposes a tax upon freight other than that both received and delivered within the State of Pennsylvania.

(Signed) CHARLES E. SMITH, *President.* { SEAL OF P. & R. R. R. CO. }

Attest:

(Signed) W. H. WEBB, *Secretary.*

Philadelphia and Reading Railroad Company, in account with the Commonwealth of Pennsylvania, Dr.

For tax on tonnage, per act of August 25, 1864, for the quarters ending December 31st, 1865, and March 31st and June 30th, 1866, as per report herewith filed:

Due Commonwealth, on settlement Dec. 16, 1865		$33,146 30
First class,	3,478,011 tons tax 2c. per ton	69,560 22
Second class,	77,413 " " 3c. " "	2,322 39
Third class,	259,976 " " 5c. " "	12,998 80
		118,027 91

CR.

By payment into the treasury, Dec. 23, 1865	33,146 30
Due Commonwealth	$84,881 41

AUDITOR GENERAL'S OFFICE,
Harrisburg, Oct. 25th, 1866.

Settled and entered:

[L. S.]

D. C. MAURER,
For J. F. Hartranft, Auditor General.

TREASURY OFFICE, PA., *Harrisburg, Oct. 25th, 1865.*

Approved:

W. H. KEMBLE,
State Treasurer.

56 Also, the evidence of the witnesses as then given, which it is agreed shall be considered as given in the present case, and made part of this record, pro-ut the same as follows, to wit:

57 W. H. WEBB, sworn:

I am secretary of the Philadelphia and Reading Railroad Company. The coal intended for exportation, carried on this road, is sent to Port Richmond. That intended for Philadelphia is sent to the city. An account is kept of all stopped at Port Richmond, destined to be there sold within the State; also of all destined to be shipped beyond the State.

The account is in detail for 1866, and aggregate for 1865. The whole quantity carried to Port Richmond in 1866 was 2,292,832 tons. Of that there remained in this State 183,603 tons. All not consumed in Pennsylvania was shipped abroad to all points out of the United States. In the year 1865 there were shipped 1,996,417 tons; of that, 141,008 tons

remained in Pennsylvania. The rest went abroad to other States and foreign countries.

Cross-examined:

The coal was delivered at Port Richmond to the various agents of coal operators—those who buy the coal at the mines and ship it. The most of it is dumped directly into the vessels that the agents have brought up to receive the coal; 70 to 75 per cent. is delivered directly from the cars to the boats; the residue is temporarily deposited till vessels can come to receive it; five per cent. to ten per cent. is generally screenings, some of which is sold at the ground; I think five per cent. is so sold, besides screenings five per cent., making, perhaps, ten per cent. in all.

The screenings and ten per cent. are not originally destined for points out of the State, and separate rates of freight are charged on that coal. We have two rates, one on that to be exported, the other on that to be sold for home consumption; that ten per cent. is already returned as coal to be delivered within the State, and the tax is paid on it. That is returned as local.

58 JOHN TUCKER, sworn:

I have been connected with the Philadelphia and Reading Railroad Company since 1843; the wharves at Richmond were built to export coal from this State; last year there were carried three millions and seven hundred odd thousand tons; 2,200,000 of that were exported; that is the proportion that the quantity exported bears to that consumed at home; at Richmond there are twenty-one large wharves; branches run to the main line of the road; cars are run to the wharves, and if vessels are there to receive it, the coal is shot directly from the cars into the vessels; if there are none, it is temporarily deposited on the wharves till vessels come; besides, there are yards expressly prepared for retailing coal; wharves extend out 500 feet to the end of the wharf. I am familiar with the course of the coal trade; a very small proportion is sold at Richmond. There are two classes of shippers—one mine, the others buy and sell; both classes sell before the coal leaves the mines; one firm contracted for 500,000 tons, to be delivered out of the State, before a ton was mined; must sell before it arrives, or the wharves would be filled and trade blocked; if any coal is deposited, it is the accident of trade by vessels not coming in; that destined for the wharves at Richmond is charged at a lower rate, to compete with other companies; the wharves belong to the company, and no charge is made for their use; they are not storehouses, but destined for the use of shipping; the company also owns many vessels to ship abroad; the retail trade at Richmond has grown up since the company's business was established there; the orders for shipment are always in advance of the supply; one day's carriage would fill the wharves if the coal were not removed; if any is sold at Richmond, it is charged an extra price for transportation; that delivered through the Schuylkill Canal is destined for exportation; they have wharves, as we, and coal is transported directly from cars to the boat. Coal is not sold at the end of the lateral road; it is started to go through, and is destined for shipment abroad from the beginning. Their system of shipping and loading is the same as that of the Philadelphia and Reading Railroad at Richmond. The main object of all is to ship abroad.

59 It is conceded that this corporation is a company engaged in carrying alone and has no interest whatever in the articles trans-

ported, and extends from Port Richmond, in the city of Philadelphia, to Pottsville, in Schuylkill, Penn'a, and all of the other roads named in the return are feeder roads connected with the road from Philadelphia to Pottsville, and worked by the Philadelphia and Reading Rail Company, are leased or owned by it, and the business on them conducted in the same manner.

60 *Charge of the court.*

The court, PEARSON, P. J., charged the jury as follows:

The facts in the present case are few, undisputed, and have all been admitted on the trial. The Philadelphia and Reading Railroad Company is a corporation created under the laws of this State, and is engaged in the sole business of transporting freight for hire. It carries no commodities of its own. Its principal business is freighting coal from the mountains to Port Richmond, near Philadelphia. A portion finds a market in the city, but by much the largest part is purchased by coal merchants in other States from the owners of mines, and the same is carried directly on the defendants' cars to the vessels in which it is shipped to market on the Delaware River and by sea to ports within the United States, but beyond our borders. It is conceded that the tonnage taxed imposed by the acts of April and August, 1864, has been paid by this company on all freight destined originially for a home market, or disposed of within the State; and the whole contest relates to that originally intended to be shipped to other States and actually so sent. It must be conceded that every State can impose taxes on all of its internal business, on all of that which is carried on within its borders; and also could, in like manner, on articles transported into other States or foreign countries, unless restrained by the Constitution of the United States. There are but two constitutional provisions tending to prohibit a tax of this character—the one declaring that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws;" the other that "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." We can scarcely consider it possible that under the federal compact any State can prohibit the right of transit through its borders, or impose any tax for the privilege of the citizen of other States crossing its lines, with his person or property. If the decision of the Supreme Court of the United States, in the passenger cases, 7 Howard, or Crandall vs. The State of Navada, in 6 Wallace, 35, is to be considered law, no tax of that character can be exacted from the person, and if it can on property, the right of transportation may be prohibited altogether, for it has been repeatedly declared by the judges of the Supreme Court that the power to tax is the power to exclude.

If one State can tax goods in transit, another may. Pennsylvania can as well impose a tax of two dollars as two cents per ton on all goods carried through the State. If she can say that every barrel of flour carried across the State from the far West, to seek a market in New York, shall pay a tax of one dollar, Ohio, Indiana, Illinois, Iowa, and New Jersey can impose a like sum, and thus the flour of Nebraska be shut out from the seaboard. A like sum could be exacted on
61 each hundred pounds of goods going West. This, according to what has been frequently declared by the courts, both State and national, would defeat one of the fundamental principles of the Federal

remained in Pennsylvania. The rest went abroad to other States and foreign countries.

Cross-examined:

The coal was delivered at Port Richmond to the various agents of coal operators—those who buy the coal at the mines and ship it. The most of it is dumped directly into the vessels that the agents have brought up to receive the coal; 70 to 75 per cent. is delivered directly from the cars to the boats; the residue is temporarily deposited till vessels can come to receive it; five per cent. to ten per cent. is generally screenings, some of which is sold at the ground; I think five per cent. is so sold, besides screenings five per cent., making, perhaps, ten per cent. in all.

The screenings and ten per cent. are not originally destined for points out of the State, and separate rates of freight are charged on that coal. We have two rates, one on that to be exported, the other on that to be sold for home consumption; that ten per cent. is already returned as coal to be delivered within the State, and the tax is paid on it. That is returned as local.

58 JOHN TUCKER, sworn:

I have been connected with the Philadelphia and Reading Railroad Company since 1843; the wharves at Richmond were built to export coal from this State; last year there were carried three millions and seven hundred odd thousand tons; 2,200,000 of that were exported; that is the proportion that the quantity exported bears to that consumed at home; at Richmond there are twenty-one large wharves; branches run to the main line of the road; cars are run to the wharves, and if vessels are there to receive it, the coal is shot directly from the cars into the vessels; if there are none, it is temporarily deposited on the wharves till vessels come; besides, there are yards expressly prepared for retailing coal; wharves extend out 500 feet to the end of the wharf. I am familiar with the course of the coal trade; a very small proportion is sold at Richmond. There are two classes of shippers—one mine, the others buy and sell; both classes sell before the coal leaves the mines; one firm contracted for 500,000 tons, to be delivered out of the State, before a ton was mined; must sell before it arrives, or the wharves would be filled and trade blocked; if any coal is deposited, it is the accident of trade by vessels not coming in; that destined for the wharves at Richmond is charged at a lower rate, to compete with other companies; the wharves belong to the company, and no charge is made for their use; they are not storehouses, but destined for the use of shipping; the company also owns many vessels to ship abroad; the retail trade at Richmond has grown up since the company's business was established there; the orders for shipment are always in advance of the supply; one day's carriage would fill the wharves if the coal were not removed; if any is sold at Richmond, it is charged an extra price for transportation; that delivered through the Schuylkill Canal is destined for exportation; they have wharves, as we, and coal is transported directly from cars to the boat. Coal is not sold at the end of the lateral road; it is started to go through, and is destined for shipment abroad from the beginning. Their system of shipping and loading is the same as that of the Philadelphia and Reading Railroad at Richmond. The main object of all is to ship abroad.

59 It is conceded that this corporation is a company engaged in carrying alone and has no interest whatever in the articles trans-

ported, and extends from Port Richmond, in the city of Philadelphia, to Pottsville, in Schuylkill, Penn'a, and all of the other roads named in the return are feeder roads connected with the road from Philadelphia to Pottsville, and worked by the Philadelphia and Reading Rail Company, are leased or owned by it, and the business on them conducted in the same manner.

60 *Charge of the court.*

The court, PEARSON, P. J., charged the jury as follows:

The facts in the present case are few, undisputed, and have all been admitted on the trial. The Philadelphia and Reading Railroad Company is a corporation created under the laws of this State, and is engaged in the sole business of transporting freight for hire. It carries no commodities of its own. Its principal business is freighting coal from the mountains to Port Richmond, near Philadelphia. A portion finds a market in the city, but by much the largest part is purchased by coal merchants in other States from the owners of mines, and the same is carried directly on the defendants' cars to the vessels in which it is shipped to market on the Delaware River and by sea to ports within the United States, but beyond our borders. It is conceded that the tonnage taxed imposed by the acts of April and August, 1864, has been paid by this company on all freight destined originially for a home market, or disposed of within the State; and the whole contest relates to that originally intended to be shipped to other States and actually so sent. It must be conceded that every State can impose taxes on all of its internal business, on all of that which is carried on within its borders; and also could, in like manner, on articles transported into other States or foreign countries, unless restrained by the Constitution of the United States. There are but two constitutional provisions tending to prohibit a tax of this character—the one declaring that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws;" the other that "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." We can scarcely consider it possible that under the federal compact any State can prohibit the right of transit through its borders, or impose any tax for the privilege of the citizen of other States crossing its lines, with his person or property. If the decision of the Supreme Court of the United States, in the passenger cases, 7 Howard, or Crandall vs. The State of Navada, in 6 Wallace, 35, is to be considered law, no tax of that character can be exacted from the person, and if it can on property, the right of transportation may be prohibited altogether, for it has been repeatedly declared by the judges of the Supreme Court that the power to tax is the power to exclude.

If one State can tax goods in transit, another may. Pennsylvania can as well impose a tax of two dollars as two cents per ton on all goods carried through the State. If she can say that every barrel of flour carried across the State from the far West, to seek a market in New York, shall pay a tax of one dollar, Ohio, Indiana, Illinois, Iowa, and New Jersey can impose a like sum, and thus the flour of Nebraska be shut out from the seaboard. A like sum could be exacted on
61 each hundred pounds of goods going West. This, according to what has been frequently declared by the courts, both State and national, would defeat one of the fundamental principles of the Federal

Constitution, and subvert and overturn a main object in its adoption. If such a power to tax is conceded, there can be no other restraint than State wants, or legislative cupidity.

Is this an impost or duty on imports and exports? According to the case of Almy vs. The State of California, it clearly is such. That, in our judgment, is too plain for argument; for notwithstanding what is said by our Supreme Court about the cases being distinguishable in principle, yet I think that it is "a distinction without a difference." C. J. Taney says in that case, "If the tax was laid on the gold or silver exported, every one would see that it was repugnant to the Constitution of the United States." The Chief Justice there refers with approbation to what is said by Chief Justice Marshall in Brown vs. The State of Maryland, and cannot, for the purpose under consideration, have alluded to any other part of that opinion than the expression, "We suppose the principles laid down in this case apply equally to importations from a sister State." We thus have the opinion of two learned judges on this point, both concurring in the declaration that the constitutional prohibition against taxing imports and exports applies as well to articles carried to or from sister States, as to those sent to, or brought from, foreign countries.

This case of Almy vs. The State of California, is, however, overruled by the present Supreme Court of the United States, in Woodruff vs. Parham, reported in the Jan. No. (1870) of the American Law Register, p. 25; and also in Hinson vs. Lott, same book, p. 36; in each of which it is decided that the words, "imports and exports," as used in the Federal Constitution, apply to such articles as are sent to, and brought from, foreign countries, and not to the intercourse between the States. The judge, in delivering the opinion of the court in those cases, in speaking of Almy vs. The State of California, says: "It is impossible to examine the opinion without perceiving that the mind of the writer was exclusively directed to foreign commerce, and there is no reason to suppose that the question which we have discussed was in his thought." We may very rationally infer that Chief Justice Taney knew that California was one State of this Union, and New York another; and that the article proposed to be taxed was transported from the one to the other; and that, in speaking of this as an export, he was following what was said by Chief Justice Marshall, and many other judges in different reported cases. It is impossible, however, to read these two opinions without coming to the conclusion that the mind of the writer was exclusively directed to the subject of taxation, rather than to the consequences of the construction put on the Federal Constitution. According to these decisions the State of California can impose a tax of a dollar an ounce on each parcel of gold dust, or bullion, shipped to New York, but can impose no tax on that which is sent to London; and can also exact a like sum on goods shipped from Boston or New York to San Francisco, but nothing on articles brought from London or Paris; thus discriminating against our own people. Louisiana or Alabama can in like manner tax each bale of cotton sent out of the State to any other State of the Union, or each barrel of corn or bushel of wheat
62 brought into the State from any other, but can levy no tax on the cotton shipped to Europe or grain brought from South America or Mexico. That is not all; the 5th No. of the 9th sec. of the Constitution provides, "No tax or duties shall be laid on articles exported from any State." This is intended as a limitation on the power of Congress, as is manifest from what precedes and succeeds it. The word "exported," as there used, should receive the same judicial construction as is given to

the 2d No. of the 10th sec. already cited. Consequently Congress can impose a tax on every bale of cotton carried from a Southern to a Northern State, or on every box of goods transported from an Eastern, or barrel of flour or corn from a Western to a Southern State, but can exact nothing from similar articles sent abroad. We do not believe the framers of the National Constitution ever intended that either the Congress of the United States or the legislatures of the different States should thus possess the power to discriminate against our own people. By giving the words "imports and exports" their obvious and natural meaning, as always heretofore placed on them, we avoid the possibility of injurious legislation by any State or the National Congress. Goods can thus go freely to every part of the country without being taxed at each State line. Our coal and iron can go to New York or Boston free of tax or duty, and their manufactures can come here in like manner. We must, however, take these last decisions as true expositions of the law until the present Supreme Court of the United States, or their successors, please to overrule them as they have those of their predecessors.

Does the tax imposed by the act of 1864 "regulate commerce among the several States?" That it tends to embarrass it is very clear. We have never doubted the power of State legislation to tax our own citizens, or corporations created by our laws, to any amount the public wants may require. All of the business carried on within the State can be thus burdened. Our objection is to taxing articles going out, or of coming into the State. The tax thus imposed falls on the citizens of other States—on the importer or exporter. The acts of assembly in question do not pretend to tax the franchises or business of the corporation created by, or empowered to do business under our laws; it was manifestly the legislative intention to impose the tax on the goods carried. Where the corporation was unlimited as to the charge for freight, it was expected that the tax would be added thereto. Where there was a limitation by law, the 1st sec. of the act of August 25th, 1864, authorizes companies doing business like this railroad, "to add the tax hereby imposed to said tolls, and collect the same therewith," thus clearly taxing the goods. We shall not a second time reëxamine and cite the various cases bearing on this subject. They were all referred to in the opinion filed in the case of The Commonwealth vs. The Lackawanna, Delaware and Western Railroad Company, and many of them in this same case on the former trial. We then expressed the opinion that Congress alone had power to regulate commerce between the States, that the same words conveyed that power which authorized the regulation of commerce with foreign countries; it is all in one sentence. We should all be startled at an attempt on the part of one of the States to regulate commerce with foreign nations; the inability so to do would be self-evident; and this, too, whether Congress had or had not legislated on the subject. Chief Justice Marshall says, in Gibbons vs. Ogden, 9 Wheaton, 1, that commerce is intercourse; and the same learned
63 judge repeatedly declared that the power to tax is the power to exclude. Such also was the opinion of Judge Grier and some of the other judges as expressed in the Passenger cases.

We think that our supreme court entirely mistook the force of the opinion in the Erie Railway Company, in the State of New Jersey, and also in 27 Missouri R., 464. They seem to have imagined that those courts decided their statutes unconstitutional because they discriminated between their own citizens and those of other States. That is merely mentioned as an evidence of injustice, not as a ground on which they could decide the cases. They well knew that if it depended on an abuse

of legislative discretion, there was no ground for declaring the law void. A similar intimation is thrown out by Mr. Justice Miller in the Alabama cases. With all due deference, the Constitution of the United States does not depend on an injudicious exercise of power. We must be governed by the words of the instrument. If State legislation is restrained, it is done absolutely; not dependent on its form or character. The law cannot say we will tax the citizen one dollar per barrel for each barrel of flour made in the State, and impose a like tax on each barrel carried through the State. It is either a regulation of commerce between the States, and therefore unauthorized, or it can be enforced. The only restraint on State legislation is to be found in their own constitutions or in that of the United States.

Although we are by no means convinced by the opinion delivered by the supreme court on this question, yet we will carry it into full effect by following out its mandates. The jury is therefore instructed to render a verdict in favor of the Commonwealth for the amount of tax assessed against this railroad company by the accounting department, and still remaining unpaid for freight carried out of the State, to wit, the sum of $46,515 04, with interest thereon at the rate of six per cent. per annum, from the 25th day of January, 1867.

The attorney general has asked us to instruct you that the State is entitled to recover interest at the rate of 12 per cent. after two months from the date of settlement, under the act of May 1, 1868. We decline so to decide, as this settlement was made long before the enactment of that law, which, as we construe it, applies solely to future settlement.

This charge, with the answer to the points, embraces every legal principle necessary for the decision of the cause.

To the charge and answer to the points both the attorney general for the Commonwealth and the counsel for the defendants did except, and at the request of each this bill of exceptions sealed.

[L. S.] JOHN J. PEARSON.

64 *Defendants' points submitted in writing to the court.*

The counsel for the defendants respectfully request the court to charge the jury as follows:

1. That the first section of the act of the general assembly of Pennsylvania, approved April 30th, 1864, entitled "An act imposing additional taxes for State purposes and to abolish the revenue board," the first section of the act of the general assembly of Pennsylvania, entitled "An act to provide additional revenue for the use of the Commonwealth," approved the 25th day of August, 1864; and the seventh section of the act of the general assembly of Pennsylvania, entitled "An act to revise, amend, and consolidate the several laws taxing corporations, brokers, and bankers," approved the 1st day of May, 1868, so far as they or any of them apply to freight originally destined and sold for exportation to points beyond the limits of the State of Pennsylvania, and then actually so exported in continuous course of transportion on the railroad of the defendants to points on the river Delaware, and the Schuylkill Canal, and thence by vessels to its original points of destination, is in conflict with the clause of the Constitution of the United States which provides that "the Congress shall have power to regulate commerce with foreign nations, among the several States, and with the Indian tribes."

2. That the aforesaid sections of acts of assembly, so far as they or any of them apply to freight originally sold and destined for exporta-

tion in the manner aforesaid, and actually exported in the manner aforesaid, are in conflict with the clause of the Constitution of the United States which provides that "no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws."

3. That under the Constitution of the United States the State of Pennsylvania has no authority to tax the business of transporting freight from a point in the State of Pennsylvania to points in another State or other States.

4. That if the jury find from the evidence that the freight on which the Commonwealth of Pennsylvania seeks to recover a tax was sold for shipment to points beyond the State of Pennsylvania before being loaded on the defendants' cars, was placed thereon, carried to points of transshipment on navigable water, and there loaded on vessels and actually sent to its point of destination in another State, or in a foreign country, the verdict must be for the defendants.

65 *Answers of the court to the points submitted by defendant.*

First. According to the decision of the supreme court of Pennsylvania, by which we have declared our intention to be governed in the present case, the taxes imposed by the acts of April and August, 1864, referred to in the point, so far as they apply to commodities destined for shipment beyond the States, and actually so transported, are not in conflict with that provision in the Constitution of the United States which provides that "Congress shall have power to regulate commerce with foreign nations, among the several States, and with the Indian tribes"—are according to that determination strictly constitutional, and must be enforced. We are not called on in the present case to make any decision relative to the act of May 1st, 1868, it having been enacted subsequent to this appeal, and no tax having been assessed under its provisions.

Second. We decline to decide as requested in this point. Although the tax in controversy is assessed by the accounting department on freight originally destined for transportation beyond the State, and actually so transported, and yet, as it has not been shown on the trial that it was shipped to foreign countries, but was nearly all sent to sister States, it does not come within the constitutional inhibition declaring that "no State shall without the consent of Congress lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws." The Supreme Court of the United States has decided that the prohibition applies to imports and exports from and to foreign countries alone, and not to or from sister States, as appears from the cases of Woodruff vs. Parham and Hinson vs. Lott, already cited in the general charge.

Third. This point we also answer in the negative. It is precisely the same question presented when this case was before the court on a former occasion, and for answering which in the affirmative the cause was reversed.

Fourth. Although the corporation defendant is a mere carrier for hire, and received the tonnage for transportation to points beyond the State, according to the original contract of shipment, the arrangement having been made before the freight was loaded on the defendants' cars to send the commodity into another State, or States, and the whole was carried, partly on the railroad, and the residue of the distance on the navigable waters of the river, or by sea, as assumed in the point; yet, ac-

cording to the decision of the Supreme Court it is subject to the tax imposed—not on the railroad company, but on the goods. If the defendant had shown on the trial that the freight had been transported to a foreign country, it would then have been a "duty on exports," and we should not hesitate to declare the same illegal. But it has not been proved that any portion of the tonnage was sent abroad; and if such had been the case the defendant should have shown it by its return, or proved it on the trial. Every presumption is to be made against the party who makes report of its business to the department. We cannot infer that any of the freight was sent into foreign countries in the absence of proof.

Endorsed as follows: Notes, points, and charge filed April 18, 1870.
JOS. H. NISSLEY, *Prothy.*

66 In the supreme court of Pennsylvania, in and for the middle district, set.

{ SEAL OF THE SUPREME COURT OF PENNSYLVANIA, MID. DIST. } The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Dauphin, greeting:

Because in the record and process, and in rendering the judgment in a certain plaint, which was in our said court, before the judges of the same court, by our writ between The Philadelphia and Reading Railroad Company, plaintiff in error, and The Commonwealth of Pennsylvania, defendant in error, as it is said, manifest error hath intervened, to the great damage of the said plaintiff in error, as by the complaint of the same plaintiff in error we have received information; we, willing that if any error be therein it should be corrected, and that speedy justice be done to the parties in this part, do command you that if judgment, as it is said, be rendered in the said plea, then the record and process, and all things touching the same, under your seals, distinctly and openly, you have before the justices of our supreme court of Pennsylvania, at a supreme court to be held at Harrisburg, in and for the middle district of said Commonwealth, on the third Monday of May next, and this writ, that, the record and process aforesaid being inspected, we may further cause to be done what of right and according to our laws and customs ought.

Witness the Honorable James Thompson, chief justice of our said supreme court, at Harrisburg, the 9th day of April, in the year of our Lord one thousand eight hundred and seventy, and of the Commonwealth the 93d.

Allowed.

WALLACE DEWITT, *Prothonotary.*

The record and process, and all things touching the same, so full and entire as before us they remain, to the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the middle district, we certify and send as within we are commanded.

[L. S.] JNO. J. PEARSON,
President Judge.

(Indorsed:) No. 78. May term, 1870. Supreme court of Pennsylvania, middle district. The Philadelphia and Reading Railroad Company, plaintiff in error, vs. The Commonwealth of Pennsylvania, defendant in

error. Writ of error to the court of common pleas for the county of Dauphin, returnable the 3d Monday of May, 1870. Rule on the defendant in error to appear and plead on the return-day of the writ.

"N. B.—20 days' notice to the parties or their counsel below is necessary to compel an appearance."

W. DEWITT, *Proth'y.*

Filed in Dauphin common pleas, April 9, 1870. Jos. H. Nisley, proth'y.

67 In the supreme court of Pennsylvania in and for the middle district, ss:

At a supreme court of the State of Pennsylvania in and for the middle district, begun and held at the city of Harrisburg, on the first Monday of May, A. D. 1870—present, the Honorable James Thompson, chief justice of the supreme court of Pennsylvania: John M. Read, Daniel Agnew, and George Sharswood, justices; and Wallace DeWitt, prothonotary—among the records of the said supreme court of Pennsylvania, in and for the middle district, to May term, 1870, No. 78, is contained as follows, to wit:

Writ of error to court of common pleas of Dauphin County.

THE PHILADELPHIA AND READING RAILROAD Company, plaintiff in error, defendant below, *vs.* THE COMMONWEALTH OF PENNSYLVANIA, defendant in error, plaintiff below. } Of May term, 1870. No. 78.

68 *Docket entries.*

Precipe for writ of error to court of common pleas of Dauphin County Affidavit and bond filed April 9, 1870.

Writ of error to court of common pleas of Dauphin County, issued April 9, 1870; returnable the 3d Monday of May, 1870.

Assignments of error filed May 16, 1870.

Writ of error returned with record from the court of common pleas of Dauphin County, and filed May 16, 1870.

And now, to wit, May 24, 1870, this cause came on to be heard, and, on due consideration, it is ordered that the judgment of the court below be affirmed, this court being of opinion that the rulings of the learned judge of the court below, complained of in the assignments of error, were, in all respects, in conformity with law.

THOMPSON, *C. J.*

May 31, 1870. Petition for writ of error to the Supreme Court of the United States.

69 Citation and writ of error from the Supreme Court of the United States. Allowed by W. Strong, justice of the U. S. S. C., and bond in the sum of $110,000 00. Approved by W. Strong, ass't just. U. S. S. C. Filed. Same day a copy of the writ of error from the Supreme Court of the United States for the defendant in error received and filed.

June 16, 1870. Service of citation accepted by Att'y Gen. Brewster, and copy of writ of error from U. S. S. C. received by him.

Certified from the record.

{ SEAL OF THE SUPREME COURT OF THE STATE OF PENNSYLVANIA, MID. DIST. }

WALLACE DEWITT,
Prothonotary.

70 *Precipe for writ of error to the court of common pleas of Dauphin County.*

In the supreme court of Pennsylvania in and for the middle district.

THE PHILADELPHIA AND READING RAILROAD Company, plaintiff in error, defendant below,
vs.
THE COMMONWEALTH OF PENNSYLVANIA, defendant in error, plaintiff below.

In Dauphin common pleas, No. 6, January term, 1867.

Issue writ of error to the court of common pleas for the county of Dauphin (of January term, 1867, No. 6) to bring up record and proceedings in case of The Commonwealth of Pennsylvania vs. The Philadelphia and Reading Railroad Company.

JAMES E. GOWEN,
J. C. KUNKEL,
R. A. LAMBERTON,
Att'ys for Plaintiff.

71 Franklin B. Gowen, being duly sworn, deposes and says that he is president of the Philadelphia and Reading Railroad Company, plaintiffs in error above named; and that the writ of error is not intended for delay.

FRANKLIN B. GOWEN.

Sworn and subscribed before me this 8th April, 1870.
[L. S.]

B. F. HORAN,
Notary Public.

Copy of bond.

Sur writ of error to the court of common pleas of the county of Dauphin.

THE PHILADELPHIA AND READING RAILROAD Company, plaintiff in error
vs.
THE COMMONWEALTH OF PENNSYLVANIA, defendant in error.

We, the Philadelphia and Reading Railroad Company, A. E. Borie, and Robert B. Cabeen, severally acknowledge to owe the above-
72 named defendant in error the sum of one hundred and twenty-five thousand dollars, upon condition that the above-named plaintiffs in error prosecute their writ of error with effect, and if judgment be affirmed, or the writ of error be discontinued, or non-prossed, that

they pay the debt, damages, and costs adjudged or accruing upon such judgment and all other damages and costs that may be awarded upon such writ of error, or else we will do it for them.

{ SEAL OF THE PHILADELPHIA AND READING R. R. CO. }

FRANKLIN B. GOWEN,
President.

Attest:

J. W. JONES, *for Secretary.*

ROB. B. CABEEN.
A. E. BORIE.

Taken and acknowledged this 8th day of April, 1870, before me.

[L. S.] JAMES ROSS SNOWDEN,
Proth'y Sup. C't. Pa. East Dist., and ex-officio Comm'r of Bail.

(Endorsed as follows:) Filed April 9, 1870. Wallace DeWitt, proth'y.

73 *Assignments of error.*

1. The learned judge of the court below erred in instructing the jury as follows:

"The jury is therefore instructed to render a verdict in favor of the Commonwealth for the amount of tax assessed against the railroad company by the accounting department, and still remaining unpaid for freight carried out of the State, to wit, the sum of $46,515 04."

2. The learned judge of the court below erred in declining to instruct the jury as requested by the defendants below in their first point, viz:

"That the first section of the act of the general assembly of Pennsylvania, approved April 30, 1864, entitled 'An act imposing additional taxes for State purposes, and to abolish the revenue board,' the first section of the act of the general assembly of Pennsylvavia, entitled 'An act to provide additional revenue for the use of the Commonwealth," approved the 25th day of August, 1864, and the seventh section of the act of the general assembly of Pennsylvania, entitled 'An act to revise, amend, and consolidate the several laws taxing corporations, brokers, and bankers,' approved the 1st day of May, 1868, so far as they, or any of them, apply to freight originally destined and sold for exportation to points beyond the limits of the State of Pennsylvania, and then actually so exported in a continuous course of transportation on the railroad of the defendants to points on the river Delaware and the Schuylkill Canal, and thence by vessels to its original points of destination, are in conflict with the clause of the Constitution of the United States which provides that 'the Congress shall have power to regulate commerce with foreign nations, among the several States, and with the Indian tribes.'"

3. The learned judge of the court below erred in answering the said first point of the defendants below as follows:

"According to the decision of the supreme court of Pennsylvania, by which we have declared our intention to be governed in the present case, the taxes imposed by the acts of April and August, 1864, referred to in the point, so far as they apply to commodities destined for shipment beyond the State and actually so transported, are not in conflict with that provision in the Constitution of the United States which provides that 'Congress shall have power to regulate commerce with foreign nations, among the several States, and with the Indian tribes,'

are according to that determination strictly constitutional, and must be enforced. We are not called on, in the present case, to make any decision relative to the act of May 1st, 1868, it having been enacted subsequent to this appeal, and no tax having been assessed under its provisions."

4. The learned judge of the court below erred in declining to instruct the jury as requested by the defendants below in their second point, viz:

74 "That the aforesaid sections of acts of assembly, so far as they or any of them apply to freight originally sold and destined for exportation in the manner aforesaid, and actually exported in the manner aforesaid, are in conflict with the clause of the Constitution of the United States which provides that 'no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.'"

5. The learned judge of the court below erred in answering the said second point of the defendants below as follows:

"We decline to decide as requested in this point. Although the tax in controversy is assessed by the accounting department on freight originally destined for transportation beyond the State, and actually so transported, yet, as it has not been shown in the trial that it was shipped to foreign countries, but was nearly all sent to sister States, it does not come within the constitutional inhibition declaring that 'no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.' The Supreme Court of the United States has decided that the prohibition applies to imports and exports from and to foreign countries alone, and not to or from sister States, as appears from the case of Woodruff vs. Parham, and Hinson vs. Lott, already cited in the general charge."

6. The learned judge of the court below erred in declining to instruct the jury as requested by the defendants below in their third point, viz:

"That under the Constitution of the United States, the State of Pennsylvania has no authority to tax the business of transporting freight from a point in the State of Pennsylvania to points in another State or other States."

7. The learned judge of the court below erred in answering the said third point of the defendants below, as follows:

"This point we also answer in the negative. It is precisely the same question presented when this case was before the court on a former occasion, and for answering which in the affirmative the cause was reversed."

8. The learned judge of the court below erred in declining to
75 instruct the jury as requested by the defendants below in their fourth point, viz:

"That if the jury find from the evidence that the freight on which the Commonwealth of Pennsylvania seeks to recover a tax was sold for shipment to points beyond the State of Pennsylvania before being loaded on the defendants' cars, was then placed thereon, carried to points of transshipment on navigable water, and there loaded on vessels and actually sent to its point of destination in another State or in a foreign country, the verdict must be for the defendants."

9. The learned judge of the court below erred in answering the said fourth point of the defendants below as follows:

"Although the corporation defendant is a mere carrier for hire, and received the tonnage for transportation to points beyond the State,

according to the original contract of shipment, the arrangement having been made before the freight was loaded on the defendants' cars to send the commodity into another State or States, and the whole was so carried partly on the railroad, and the residue of the distance on the navigable waters of the river or by sea, as assumed in the point, yet, according to the decision of the Supreme Court, it is subject to the tax imposed, not on the railroad company, but on the goods. If the defendant had shown on the trial that the freight had been transported to a foreign country, it would then have been a 'duty on exports,' and we should not hesitate to declare the same illegal. But it has not been proved that any portion of the tonnage was sent abroad, and if such had been the case, the defendant should have shown it by its return or proved it on the trial. Every presumption is to be made against the party who makes report of its business to the department. We cannot infer that any of the freight was sent into foreign countries in the absence of proof."

(Endorsed as follows:) Filed May 16, 1870. Wallace DeWitt, prothonotary.

76 *Judgment.*

In the supreme court of Pennsylvania, in and for the middle district, ss:

THE PHILADELPHIA AND READING RAILROAD Company, plaintiff in error,
vs.
THE COMMONWEALTH OF PENNSYLVANIA, defendant in error.

Writ of error to court of common pleas of Dauphin County, No. 78, May T., 1870.

And now, May 24, 1870, this cause came on to be heard, and on due consideration it is ordered that the judgment of the court below be affirmed, this court being of opinion that the rulings of the learned judge of the court below complained of in the assignments of error were, in all respects, in conformity with law.

THOMPSON, *C. J.*

(Endorsed as follows:) Filed and entered May 24, 1870. Wallace DeWitt, proth'y.

77 And now here, on this day, to wit, the 31 day of May, A. D. 1870, the said The Philadelphia and Reading Railroad Company produced to the said supreme court of Pennsylvania here the writ of the United States of America for the correcting of errors of and upon the premises, commanding the record and proceedings aforesaid of the judgment aforesaid rendered, with all things concerning the same, to be transmitted to the Supreme Court of the United States to be held at the city of Washington on the first Monday in December next; which writ of error is in the words and of tenor following, to wit:

78 UNITED STATES,
Eastern District of Pennsylvania, set:

The President of the United States to the judges of the supreme court of the State of Pennsylvania, the highest court of law or equity in the said State, greeting:

Because that, in the record and process, and also in the rendering of

judgment in a suit before you, between The Philadelphia and Reading Railroad Company, a corporation of the State of Pennsylvania, plaintiff in error, and The State of Pennsylvania, defendant in error, (No. 78 of the May term, 1870, of the middle district of Pennsylvania,) in which said suit the validity of a statute of the State of Pennsylvania, on the ground of repugnancy to the Constitution of the United States, is said to have been drawn in question, and the decision to have been in favor of the said statute, a manifest error has intervened to the great damage of the said plaintiff in error, as in their complaint has been stated; and as it is just and proper that the error, if any there be, should be be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that, if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit afore-
79 said *aforesaid*, with all things concerning them, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the Supreme Court to be then and there held, that, the record and process aforesaid being inspected, the said Supreme Court may cause to be done therein what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this thirty-first day of May, A. D. one thousand eight hundred and seventy, and in the ninety-fourth year of the independence of the United States.

[SEAL.]

SAM'L BELL,
Clk C. C. U. S.

Allowed by—

W. STRONG,
Ass. Jus. S. C. U. S.

I acknowledge to have received a true copy of this writ of error, and I request that my appearance be entered for the defendant in error.

F. CARROLL BREWSTER,
Attorney General of Pennsylvania.

JUNE 7, 1870.

(Indorsed:) 32. April sess., 1870. The Philadelphia and Reading Railroad Company, plaintiff in error, v. The State of Pennsylvania, defendant in error. Writ of error from the Supreme Court of the United States to the supreme court of Pennsylvania. (S. C. of Pa., middle district, May term, 1870. No. 78.) Filed sup. c't Pa., May 31, 1870. Wallace DeWitt, prot'y, S. C. Pa.

80 In pursuance whereof, and according to the form and effect of the act of Congress in such case made and provided, a transcript of the record and proceedings, with all things relating to the same, together with the said writ of error, are hereby transmitted to the Supreme Court accordingly.

81 *Copy of bond for writ of error.*

Know all men by these presents that The Philadelphia and Reading Railroad Company, and Franklin B. Gowen and A. E. Borie, are held and firmly bound unto the State of Pennsylvania, in the sum of one hundred and ten thousand dollars, to be paid to the said State, its cer-

tain attorney or assigns; to which payment, well and truly to be made, the said Philadelphia and Reading Railroad Company hereby binds itself, and the said Franklin B. Gowen and A. E. Borie do hereby bind themselves, their heirs, executors, and administrators, jointly and severally by these presents, sealed with the corporate seal of the said company and the seals of the said F. B. Gowen and A. E. Borie, this 31st day of May, A. D. 1870.

Whereas the said Philadelphia and Reading Railroad Company sued out a writ of error from the Supreme Court of the United States to reverse a judgment rendered in a suit in the supreme court of Pennsylvania, wherein the said Philadelphia and Reading Railroad Company was plaintiff in error, and the said State of Pennsylvania defendant in error, the said suit being *to* 78 of the May term, 1870, of the said supreme court for the middle district of Pennsylvania:

82 Now, the condition of the above obligation is such, that if the said Philadelphia and Reading Railroad Company, the plaintiff in error as aforesaid, shall prosecute the said writ of error with effect, and answer all damages and costs if it shall fail to make good its plea, the above obligation shall be void; but otherwise shall remain in full force and virtue.

{ SEAL OF THE PHILADELPHIA AND READING R. R. CO. }

FRANKLIN B. GOWEN.
President.

Attest:
W. W. WEBB, *Secretary.*

FRANKLIN B. GOWEN.
A. E. BORIE.

Sealed and delivered in presence of us:
J. H. HUMPHREY.

(Endorsed as follows:)
Bond and sureties approved May 31, 1870.

W. STRONG,
Associate Justice S. C. U. S.

Filed in supreme court Penn'a May 31, 1870. Wallace DeWitt, prothonotary.

83 The United States of America to the State of Pennsylvania, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error issued from the Supreme Court of the United States to the supreme court of Pennsylvania, wherein the Philadelphia and Reading Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, viz, in a suit No. 78 of the May term, 1870, (middle district,) of the said supreme court of Pennsylvania, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William Strong, one of the associate judges of the Supreme Court of the United States, this first day of June, A. D. 1870.

W. STRONG,
Associate Justice S. C. U. S.

84 I accept service for defendant in error.

F. CARROLL BREWSTER,
Att'y General of Penn'a.

JUNE 16, 1870.

85 In testimony that the aforegoing pages from one to eighty-five inclusive, is a true copy and correct transcript taken from the record and all proceedings of the supreme court of Pennsylvania, the highest court of law or equity of the State of Pennsylvania, in the case of The Philadelphia and Reading Railroad Company, plaintiff in error, vs. The Commonwealth of Pennsylvania, defendant in error, No. 78, May term, 1870, and all the papers filed and attached to said record, I have hereunto subscribed my name and the seal of the said supreme court, affixed this 28 day of October, A. D. 1870.

[SEAL.] WALLACE DEWITT,
Prothonotary of the Supreme Court of Pennsylvania, for the Middle District.

(Indorsement on cover:) No. 358. The Philadelphia & Reading Railroad Company, plaintiff in error, vs. The Commonwealth of Pennsylvania. Pennsylvania sup. court. Filed 8th December, 1870.

IN THE SUPREME COURT OF THE UNITED STATES.

Writ of Error to the Supreme Court of Pennsylvania.

THE PHILADELPHIA AND READING RAILROAD COMPANY,

PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNA.,

DEFENDANT IN ERROR.

PAPER BOOK OF THE PLAINTIFF IN ERROR.

JAMES E. GOWEN,
ROBERT A. LAMBERTON,
For Plaintiff in Error.

THE LEISENRING PRINTING HOUSE, 237 & 239 DOCK ST., PHILADELPHIA.

In the Supreme Court of the United States.

WRIT OF ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

The Philadelphia and Reading Railroad Company, Plaintiff in Error,

vs.

The Commonwealth of Pennsylvania, Defendant in Error.

December Term, 1870.
No. 358.

PAPER BOOK OF THE PLAINTIFF IN ERROR.

This is a writ of error to a judgment of the Supreme Court of Pennsylvania, affirming the validity of a statute of the State of Pennsylvania, which was alleged to be repugnant to the Constitution of the United States.

ABSTRACT OF THE CASE.

On the 25th of August, 1864, an act of the General Assembly of the Commonwealth of Pennsylvania, entitled "An act to provide additional revenue for the use of the Commonwealth," was approved by the Governor, the first section of which provided "That the president, treasurer, cashier or other financial

officer of every railroad company, steamboat company, canal company, and slackwater navigation company, and all other companies now or hereafter doing business within this State, and upon whose works freight may be transported, whether by such company or by individuals, and whether such company shall receive compensation for transportation, for transportation and toll, or shall receive tolls only, except turnpike companies, plank-road companies, and bridge companies, shall, within thirty days after the first days of January, April, July and October of every year, make return in writing to the auditor general, under oath or affirmation, stating fully and particularly the number of tons of freight carried over, through or upon the works of said company, for the three months immediately preceding each of the above-mentioned days; and each of the companies, except as aforesaid, shall, at the time of making such return, pay to the State treasurer, for the use of the Commonwealth, on each two thousand pounds of freight so carried, tax at the following rates, viz.:—First, on the product of mines, quarries and clay-beds, in the condition in which said products may be taken therefrom, two cents; second, on hewn timber, animal food, including live stock, also, on the products of the forest, vegetable and other agricultural products, the value of which has not been increased by labor, three cents; third, on all other articles, five cents. Where the same freight shall be carried over and upon different but continuous lines, said freight shall be chargeable with tax as if it had been carried but upon one line, and the whole tax shall be paid by such one of said companies as the State treasurer may select and notify thereof; corporations whose lines of improvements are used by others for the transportation of freight, and whose only earnings arise from tolls charged for such use, are authorized to add the tax hereby imposed to said tolls and collect the same therewith, but in no case shall tax be twice charged on the same freight carried on or over the same line of improvements: *Provided*, That every company now or hereafter incorporated by this Commonwealth, whose line extends into any other State, and every

corporation, company, or individual of any other State, holding and enjoying any franchises, property or privileges whatever in this State, by virtue of the laws thereof, shall make returns of freight and pay for the freight carried over, through and upon that portion of their lines within this State, as if the whole of their respective lines were in this State." See Pamphlet Laws 1864, page 988; Brightley's Purdon's Digest, page 1379, pl. 11.

On the 25th of October, 1866, the auditor general and State treasurer of the Commonwealth of Pennsylvania stated an account between the Commonwealth and the Philadelphia and Reading Railroad Company, "for tax on tonnage per act of August 25th, 1864, for quarters ending December 31st, 1865, and March 31st and June 30th, 1866," by which the company were charged as follows:—

First class,	3,478,011	tons,	tax,	2	c.	per ton,	$69,560	22
Second "	77,413	"	"	3	"	"	2,322	39
Third "	259,976	"	"	5	"	"	12,998	80

This account was based on returns made by the company which discriminated between freight transported to points within, and that exported to points without, the State of Pennsylvania. The latter, amounting to two millions three hundred and twenty-six thousand and ten tons of the first-class, viz.: "the products of mines, quarries and clay-beds, in the condition in which said products were taken therefrom," was returned under protest against its liability to taxation. The tax assessed on this class of freight amounts to $46,520, and forms the subject of the present controversy; the balance ($38,361.41) of the assessment having been paid without objection.

The railroad company appealed from this settlement to the Court of Common Pleas of Dauphin county, of Pennsylvania,—the appeal being taken under the provisions of the eleventh section of the act of March 30th, 1811, (Brightley's Purdon, page 822, pl. 20,) and being accompanied by a specification of the objections on which it was granted, as required by the act referred to.

These objections alleged that the act of August 25th, 1864, to the extent that it imposed a tax on freight other than that both received and delivered within the State of Pennsylvania, was unconstitutional and void, because, among other reasons, it was in conflict with the fourth paragraph of the eighth section of the first article of the Constitution of the United States, (which provides that "Congress shall have power to regulate commerce with foreign nations and among the several States,") and with the second paragraph of the tenth section of the same article (which provides that "no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws").

According to the practice in such cases, the appeal was tried in the Common Pleas of Dauphin county on issues raised by pleas of *nil debet* and payment (printed record, page 6) to an ordinary declaration in debt on the settled account filed by the Commonwealth (printed record, page 4).

The trial resulted in a verdict for the defendants, (see docket entries, printed record, page 1,) the jury having found that the freight in question was originally destined for exportation beyond the boundaries of the Commonwealth of Pennsylvania, and that it was actually exported, in a continuous course of transportation, in the cars of the defendants, to points on the river Delaware, or the Schuylkill canal, and thence in vessels; and having been instructed by the court that such a finding should be followed by a verdict for the defendants. (See the charge of Judge Pearson at page 15, printed record.)

The charge of the learned judge was but a reiteration of the opinion which he had previously expressed in other cases on the constitutional points in question, and which appeared to have been acquiesced in by the Commonwealth of Pennsylvania, since, although writs of error were taken to the judgments in those cases, they were never argued, "as they were considered correctly decided by the then attorney general, Mr. Meredith." (Charge of the court, printed record, page 16.) How-

ever, a writ of error was taken to the judgment entered on the verdict in the present cause, and it resulted in the judgment of the Court of Common Pleas being reversed and a writ of *venire facias de novo* being awarded. The record of the proceedings in the Supreme Court will be found at pages 18, 19, 20 and 21 of the printed record now before this court. The opinion delivered by Mr. Justice Agnew on behalf of a majority of the Supreme Court of Pennsylvania (Read, J., dissenting) will be found at page 286 of volume 12, P. F. Smith's Reports.

On the second trial the learned judge was requested by the counsel of the defendants (the railroad company) to instruct the jury as follows:—

1. That the first section of the act of the General Assembly of Pennsylvania, approved April 30th, 1864, entitled "An act imposing additional taxes for State purposes and to abolish the revenue board;" the first section of the act of the General Assembly of Pennsylvania, entitled "An act to provide additional revenue for the use of the Commonwealth," approved the 25th day of August, 1864; and the seventh section of the act of the General Assembly of Pennsylvania, entitled "An act to revise, amend and consolidate the several laws taxing corporations, brokers and bankers," approved the 1st day of May, 1868, so far as they or any of them apply to freight originally destined and sold for exportation to points beyond the limits of the State of Pennsylvania, and then actually so exported, in continuous course of transportation, on the railroad of the defendants to points on the river Delaware and the Schuylkill canal, and thence by vessels to its original points of destination, are in conflict with the clause of the Constitution of the United States which provides that "the Congress shall have power to regulate commerce with foreign nations, among the several States, and with the Indian tribes."

2. That the aforesaid sections of acts of Assembly, so far as they or any of them apply to freight originally sold and destined for exportation in the manner aforesaid, and actually exported in the manner aforesaid, are in conflict with the clause

of the Constitution of the United States which provides that "no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

3. That under the Constitution of the United States the State of Pennsylvania has no authority to tax the business of transporting freight from a point in the State of Pennsylvania to points in another State or other States.

4. That if the jury find from the evidence that the freight on which the Commonwealth of Pennsylvania seeks to recover a tax was sold for shipment to points beyond the State of Pennsylvania before being loaded on the defendants' cars, was placed thereon, carried to points of transshipment on navigable water, and there loaded on vessels and actually sent to its point of destination in another State, or in a foreign country, the verdict must be for the defendants. (Printed record, page 34.)

The reference in these points to the first section of the Pennsylvania act of April 30th, 1864, entitled "An act imposing additional taxes for State purposes, and to abolish the revenue board;" and to the seventh section of the act of May 1st, 1868, entitled "An act to revise, amend and consolidate the several laws taxing corporations, brokers and bankers," as well as to the first section of the act of August 25th, 1864, entitled "An act to provide additional revenue for the use of the Commonwealth," may require some explanation.

The first section of the act of April 30th, 1864, (P. L., 1864, p. 218; Brightly's Purdon, p. 1377, pl. 2,) was substantially to the same effect as the first section of the act of August 25th, 1864, and was superseded and supplied by it. The seventh section of the act of May 1st, 1868, (P. L., 1868, p. 110; Brightly, p. 1536, pl. 24,) is but a re-enactment, with some immaterial modifications, of the first section of the act of August 25th, 1864. The tax in question, in this case, was claimed under the latter act only, (see settlement, p. 27, printed record,) and the constitutionality of that act is the sole point now in controversy.

The second trial resulted in a verdict for the Commonwealth

for the sum of $59,829.90 (printed record, p. 22),—the learned judge of the Court of Common Pleas being obliged to instruct the jury in conformity to the decision of the Supreme Court, and to direct them to find such a verdict,—the facts of the case being undisputed, and the only questions presented being those of law. The charge of the court will be found at page 32 of the printed record. The evidence is printed on pages 22–31, both inclusive, of the printed record. It is thus briefly summarized in the charge:—

"The facts in the present case are few, undisputed, and have all been admitted on the trial. The Philadelphia and Reading Railroad Company is a corporation created under the laws of this State, and is engaged in the sole business of transporting freights for hire. It carries no commodities of its own. Its principal business is freighting coal from the mountains to Port Richmond, near Philadelphia. A portion finds a market in the city, but by much the largest part is purchased by coal merchants in other States, from the owners of mines, and the same is carried directly on the defendants' cars to the vessels in which it is shipped to market, on the Delaware river, and by sea to ports within the United States, but beyond our borders. It is conceded that the tonnage tax, imposed by the acts of April and August, 1864, has been paid by this company on all freights destined originally for a home market, or disposed of within the State; and the whole contest relates to that originally intended to be shipped to other States, and actually so sent."

Judgment having been entered on the verdict, the railroad company took a writ of error to the Supreme Court of Pennsylvania, and in that court the judgment of the Court of Common Pleas was affirmed, as will appear by the following entry at page 41 of the printed record:—

"And now, May 24th, 1870, this cause came on to be heard, and, in due consideration, it is ordered that the judgment of the court below be approved; this court being of the opinion that rulings of the learned judge of the court below, complained of

in the assignments of error, were, in all respects, in conformity with law."

The assignments of error, in the Supreme Court of Pennsylvania, will be found at page 39 of the printed record. They are now presented to this court in support of the writ of error which has brought up the record now under consideration.

SPECIFICATIONS OF ERROR.

1. The court below erred in not sustaining the following assignment of error to the charge of the Court of Common Pleas of Dauphin county :—

"The learned judge of the court below erred in instructing the jury as follows :—

"The jury is therefore instructed to render a verdict in favor of the Commonwealth for the amount of tax assessed against the railroad company by the accounting department, and still remaining unpaid for freight carried out of the State, to wit, the sum of $46,515.04."

2. The court below erred in not sustaining the following assignment of error to the charge of the Court of Common Pleas of Dauphin county :—

"The learned judge of the court below erred in declining to instruct the jury as requested by the defendants below, in their first point, viz. :—

"That the first section of the act of the General Assembly of Pennsylvania, approved April 30th, 1864, entitled 'An act imposing additional taxes for State purposes, and to abolish the revenue board;' the first section of the act of the General Assembly of Pennsylvania, entitled 'An act to provide additional revenue for the use of the Commonwealth,' approved the 25th day of August, 1864, and the seventh section of the act of the General Assembly of Pennsylvania, entitled 'An act to revise, amend and consolidate the several laws taxing corporations, brokers and bankers,' approved the 1st day of May, 1868, so far as they, or any of them, apply to freight originally destined

and sold for exportation to points beyond the limits of the State of Pennsylvania, and then actually so exported, in a continuous course of transportation, on the railroad of the defendants, to points on the river Delaware and the Schuylkill canal, and thence by vessels to its original points of destination, are in conflict with the clause of the Constitution of the United States, which provides that 'The Congress shall have power to regulate commerce with foreign nations, among the several States, and with the Indian tribes.'"

3. The court below erred in not sustaining the following assignment of error to the charge of the Court of Common Pleas of Dauphin county:—

"The learned judge of the court below erred in answering the said first point of the defendants below as follows:—

"According to the decision of the Supreme Court of Pennsylvania, by which we have declared our intention to be governed in the present case, the taxes imposed by the acts of April and August, 1864, referred to in the point, so far as they apply to commodities destined for shipment beyond the State and actually so transported, are not in conflict with that provision in the Constitution of the United States which provides that 'Congress shall have power to regulate commerce with foreign nations, among the several States, and with the Indian tribes,' are, according to that determination, strictly constitutional and must be enforced. We are not called on in the present case to make any decision relative to the act of May 1st, 1868, it having been enacted subsequent to this appeal, and no tax having been assessed under its provisions."

4. The court below erred in not sustaining the following assignment of error to the charge of the Court of Common Pleas of Dauphin county:—

"The learned judge of the court below erred in declining to instruct the jury as requested by the defendants below, in their second point, viz.:—

"That the aforesaid sections of acts of Assembly, so far as they or any of them apply to freight originally sold and des-

tined for exportation in the manner aforesaid, and actually exported in the manner aforesaid, are in conflict with the clause of the Constitution of the United States which provides that 'No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.'"

5. The court below erred in not sustaining the following assignment of error to the charge of the Court of Common Pleas of Dauphin county:—

"The learned judge of the court below erred in answering the said second point of the defendants below as follows:—

"We decline to decide as requested in this point. Although the tax in controversy is assessed by the accounting department on freight originally destined for transportation beyond the State, and actually so transported, yet, as it has not been shown in the trial that it was shipped to foreign countries, but was nearly all sent to sister States, it does not come within the constitutional inhibition, declaring that 'No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.' The Supreme Court of the United States has decided that the prohibition applies to imports and exports from and to foreign countries alone, and not to or from sister States, as appears from the cases of Woodruff *vs.* Parham, and Hinson *vs.* Lott, already cited in the general charge."

6. The court below erred in not sustaining the following assignment of error to the charge of the Court of Common Pleas of Dauphin county:—

"The learned judge of the court below erred in declining to instruct the jury as requested by the defendants below, in their third point, viz.:—

"That under the Constitution of the United States, the State of Pennsylvania has no authority to tax the business of transporting freight from a point in the State of Pennsylvania to points in another State or other States."

7. The court below erred in not sustaining the following as-

signment of error to the charge of the Court of Common Pleas of Dauphin county :—

"The learned judge of the court below erred in answering the said third point of the defendants below as follows :—

"This point we also answer in the negative. It is precisely the same question presented when this case was before the court on a former occasion, and for answering which in the affirmative the cause was reversed."

8. The court below erred in not sustaining the following assignment of error to the charge of the Court of Common Pleas of Dauphin county :—

"The learned judge of the court below erred in declining to instruct the jury as requested by the defendants below, in their fourth point, viz. :—

"That if the jury find from the evidence that the freight on which the Commonwealth of Pennsylvania seeks to recover a tax was sold for shipment to points beyond the State of Pennsylvania before being loaded on the defendants' cars, was then placed thereon, carried to points of transshipment on navigable water, and there loaded on vessels and actually sent to its point of destination in another State, or in a foreign country, the verdict must be for the defendants."

9. The court below erred in not sustaining the following assignment of error to the charge of the Court of Common Pleas of Dauphin county :—

"The learned judge of the court below erred in answering the said fourth point of the defendants below as follows :—

"Although the corporation defendant is a mere carrier for hire, and received the tonnage for transportation to points beyond the State, according to the original contract of shipment, the arrangement having been made, before the freight was loaded on the defendants' cars, to send the commodity into another State or States, and the whole was so carried partly on the railroad and the residue of the distance on the navigable waters of the river, or by sea, as assumed in the point ; yet, according to the decision of the Supreme Court, it is subject to

the tax imposed, not on the railroad company, but on the goods. If the defendant had shown on the trial that the freight had been transported to a foreign country, it would then have been a '*duty on exports*,' and we should not hesitate to declare the same illegal. But it has not been proved that any portion of the tonnage was sent abroad, and if such had been the case, the defendant should have shown it by its return, or proved it on the trial. Every presumption is to be made against the party who makes report of its business to the department. We cannot infer that any of the freight was sent into foreign countries, in the absence of proof."

10. The court below erred in affirming the judgment of the Court of Common Pleas of Dauphin county.

BRIEF OF ARGUMENT FOR THE PLAINTIFF IN ERROR.

A. *The act of Assembly in question, so far as it imposes a tax upon the transportation of freight from or into the State of Pennsylvania, conflicts with the clause of the Constitution of the United States which gives to the Congress the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes.*

1. Assuming that the act in question is a regulation of inter-State commerce, and therefore transgressive of the constitutional authority of Congress, the first point to be considered is, whether its applicability to the domestic, as well as to the extra territorial, commerce of the State excludes it from the operation of the constitutional provision. In other words, is a regulation of commerce, which would be unconstitutional if confined to foreign commerce, rendered constitutional by being extended to domestic commerce also?

If this question must be answered affirmatively, the attempt of the framers of the Constitution to secure commerce between the States from State regulation has been singularly unsuccessful. The simple expedient of including its own domestic com-

merce within its commercial regulations will enable any State to regulate, to any extent, the commerce between the States which happens to be carried on within its territorial limits. The price to be paid for such a prerogative, would, in most cases, be trifling indeed. The citizens of Pennsylvania can well afford to submit to a commercial regulation which taxes, for their benefit, the millions of tons of freight which are transported through or from their State. A regulation of commerce which taxes the vast tonnage of the great thoroughfares which traverse the State from east to west and from north to south; which taxes the tonnage of the Pennsylvania, the Erie, the Lake Shore, the Philadelphia, Wilmington and Baltimore, the Camden and Amboy, and other railroads over which freight is transported, through or from the State; which compels foreign consumers of coal, and the other mineral products of Pennsylvania, to pay tribute for the privilege of having them transported, either by natural or artificial channels, by rivers or by railroads, is not likely to be considered oppressive by the people of Pennsylvania. A State through whose territory a single line of railroad passes, would not hesitate to regulate railroad commerce without discriminating in favor of its own domestic commerce, if the regulations proposed would render the commerce of a continent tributary to its treasury. The steamboat traffic of the Mississippi would be a tempting subject for the commercial regulations of the several States within whose boundaries it is carried on. None of the evils which induced the framers of the Constitution to invest Congress with the power of regulating commerce between the States would be avoided under such an interpretation of the Constitution. The vast increase of commerce between the States would render the burthens of State regulations an hundredfold more onerous than they were before the Constitution was adopted. In the seventh number of the *Federalist*, Mr. Hamilton, while depicting the injurious consequences of permitting the several States to regulate commerce, says: "The opportunities which some States would have of rendering others tributary to them by commercial regula-

tions would be impatiently submitted to by the tributary States. The relative situation of New York, Connecticut and New Jersey would afford an example of this kind. New York, from the necessities of revenue, must lay duties on her importations. A great part of these duties must be paid by the inhabitants of the two other States, in the capacity of consumers of what we import. New York would neither be willing nor able to forego this advantage. Her citizens would not consent that a duty paid by them should be remitted in favor of the citizens of her neighbors; nor would it be practicable, if there were not these impediments in the way, to distinguish the customers in our own markets.

"Would Connecticut long submit to be taxed by New York, for her exclusive benefit? Should we be long permitted to remain in the quiet and undisturbed enjoyment of a metropolis, from the possession of which we derived an advantage so odious to our neighbors, and, in their opinion, so oppressive?" *Federalist*, (ed. A, 1852,) p. 31.

It is not here suggested that the duties levied by New York would be the less oppressive to the citizens of New Jersey or Connecticut, because they might be imposed upon citizens of New York also; nor can it be supposed that, at the present time, a citizen of California would not object to paying transit duties in every State through which his merchandise may happen to be transported, on its passage from the Atlantic to the Pacific, merely because the same duties were imposed upon domestic transportation within those States. It would probably occur to him that the duties collected inured to the benefit of the citizens of the States which imposed them, and not to his benefit.

Practically, therefore, the prohibition against State regulations of inter-State commerce would be nugatory, if it could be evaded by extending such regulations to domestic as well as to extra-territorial commerce; and no interpretation of the Constitution which permits such an evasion can be legitimate. Indeed, unless it can be shown that a statute which regulates commerce between the States as well as commerce in the State, is

not a regulation of commerce between the States, the argumen is at an end.

In the case of Minot *vs.* The P., W. & B. Railroad Company,—(C. C. U. S., District of Delaware, 3 Am. Law Times Reports, page 193,)—where a statute of the State of Delaware, taxing the use of locomotives and cars on railroads in that State, was held to be unconstitutional, so far as it applied to the locomotives and cars used in commerce between the States, Mr. Justice Strong, in delivering the opinion of the court, said, "And it (the statute) is not the less a commercial regulation, because it does not discriminate between transportation exclusively domestic and that which extends into other States. If a State chooses to exact conditions for allowing the passage or carriage of persons or freight through it into another State, the nature of the exaction cannot be changed by adding to it similar conditions for allowing transportation wholly within the State."

So in the case of Clarke, Treasurer of the State of Delaware, *vs.* The Philadelphia, Wilmington and Baltimore Railroad Company,—(Court of Errors and Appeals of the State of Delaware, June term, 1871,)—where the constitutionality of a statute of Delaware, imposing a tax on the transportation of any passenger within the State, was in question, and where the court unanimously held that the statute was invalid, so far as it operated upon "persons entering into, departing from, or passing through the State," Bates, Chancellor, delivering the opinion of the court, said, "It may as well be observed at this point, that no argument in support of the act can be drawn, from the fact that it operates as well upon our citizens traveling wholly within the State as upon the citizens of other States passing into or through its territory. If the legislature have not the constitutional power to tax a particular class of passengers, plainly that power cannot be derived by including under the tax law another class of passengers who *may* be constitutionally taxed. Legislative acts, to the validity of which the question of discrimination becomes material, are those which deal with a subject-matter fully within the constitutional power of the legislature of a State,

but deal with it in a mode affecting unequally its own citizens and the citizens of other States, contrary to that clause of the Federal Constitution which secures to the citizens of each State 'all privileges and immunities of citizens of the several States,'—(Art. 4, sec. 2,)—as if citizens of other States should be placed upon an unequal footing with our own citizens, under laws for the administration of public justice, or touching the descent of real estate, or the distribution of the personal estate of intestates; or as if, in the taxing of lands situated within the State, non-resident real estate owners were taxed more heavily than our own citizens holding lands. But in the present case, the Supreme Court having decided that inter-State trade is beyond the taxing power of the State, the only question is whether this act undertakes to tax the forbidden subject-matter, and it is quite immaterial whether the act also operates upon travel within the State,—a subject-matter of State control."

In Crandall *vs.* The State of Nevada, 6 Wallace, 35, an unanimous judgment of this court condemned, as unconstitutional, a statute of Nevada which imposed a tax on every passenger leaving the State. The right of citizens of the United States to pass from point to point of the national territory, unrestricted by State regulations, was emphatically asserted. Would the statute have been constitutional if it had also taxed the right of passage within the State of Nevada? Can any State tax, and, by taxing, prohibit the passage of citizens of the United States from, into, and through her territory, because she imposes a similar tax and a similar prohibition upon the right of passage within her territory? Can a State tax imported wines in the hands of the importers by a statute which taxes all wines, domestic as well as foreign?

The case of the Erie Railway Company *vs.* The State of New Jersey, (2 Broom, 531,) which, in all material respects, is identical with that now before the court, was one of those cited in support of the argument of the plaintiffs in error in the Supreme Court of Pennsylvania. It was there held by the Court of Errors and Appeals of New Jersey, that a statute of New

Jersey requiring foreign corporations doing business within that State to pay a transit duty on every passenger and every ton of goods, "except passengers and freight transported exclusively within the State," was unconstitutional and void. Chief Justice Beasely, in an opinion of singular force and ability, pointed out the intolerable evils that would ensue from recognition of the right of each State in the Union to tax persons and property in transit through its territory. He could not have thought that these evils would exist, only where domestic transportation was free from a similar burden. And yet the opinion delivered by Judge Agnew, on behalf of a majority of the Supreme Court of Pennsylvania, treats the decision in question as founded on the discrimination in the New Jersey statute between domestic and extra territorial transportation. This suggestion is not warranted by anything in the language of the chief justice, and is inconsistent with the principles asserted in his opinion. He does indeed say "This tax falls on inter-State commerce alone. It reaches no further. The burthen is not on general business, one branch of which is the transportation of extra-territorial goods. On the contrary, the only business of the plaintiffs which is not taxed is the business of such company done entirely in the State of New Jersey, and which does not consist of the transportation of merchandise from State to State. The law discriminates and selects the transportation of commodities passing from the State as the peculiar objects of the duty;" and these remarks are quoted in Judge Agnew's opinion as confirmatory of his view of the true character of the decision. But the context from which they are taken shows that the intention of the writer was to prove that the tax was, in *form* and *substance*, a direct regulation of inter-State commerce, because it bore directly, immediately and exclusively upon that commerce, and not that the tax was a regulation of inter-State commerce solely because it was not also a regulation of domestic commerce.

"The law (of a State)," says Judge Pearson, in his opinion on the second trial of this cause, "cannot say we will tax the citizen one dollar per barrel for each barrel of flour made in the

State, and impose a like tax on each barrel carried through the State."

In Hays *vs.* The Pacific Mail Steamship Company, 17 Howard, 596, it was held that the steamships of a New York company, registered at the port of New York, and engaged in trading between Panama and San Francisco, could not be taxed in California, although the company had an agency in San Francisco, and the ships landed their passengers and freight there, and then proceeded to Benicia to repair and refit, where they remained ten or twelve days after each voyage; and there is nothing in the report of the case to indicate that the law, under which the tax was attempted to be enforced, was aught else than a general tax law of California.

In Dobbins *vs.* The Commissioners of Erie County, 16 Peters, 435, it was held by the Supreme Court of the United States, reversing the judgment of the Supreme Court of Pennsylvania, (7 W., 513,) that a law of the State taxing all offices and posts of profit, professions, trades and occupations, &c., was unconstitutional in its application to an office held under the United States.

In the Bank of Commerce *vs.* New York City, 2 Black, 620, where it was held that "stock of the United States is not subject to taxation under the laws of the United States," it was also held that "A State law for that purpose is unconstitutional, whether it impose the tax on United States stock, *eo nomine,* or includes it in the aggregate of the taxpayer's property, to be valued like the rest, at its worth."

2. Considering the case then as if the tax imposed by the act in question had been expressly confined to the transportation of the freight through, into or from Pennsylvania, the plaintiffs in error contend *that the imposition of such a tax is a regulation of commerce between the States.*

If taxing inter-State commerce is not regulating it, it is not easy to imagine what would be. In Brown *vs.* The State of Maryland, 12 Wheaton, 419, Chief Justice Marshall, when speaking of the power of a State to tax its own citizens or

their property, within its territory, refers to the imposition of a State tax upon goods passing through or from the State, as an extreme illustration, apparently, of an encroachment upon the reserved power of Congress to regulate commerce. "If the States," said he, "may tax all persons and property found in their territory, what shall restrain them from taxing goods in their transit through the State, from one part to another, for the purpose of re-exportation? The laws of trade authorize this operation, and general commerce requires it. *Or what restrains a State from taxing any article passing through it, from one State to another, for the purposes of traffic? Or from taxing the transportation of articles passing from the State itself, to another State, for commercial purposes?* These cases are all within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce, and affect, materially, the purposes for which the power was given." "But," it is said, in the opinion of the Supreme Court of Pennsylvania, 12 P. F. Smith, p. 297, "the chief justice had reference to specific burdens. These subjects must not be singled out and taxed, for this would be discrimination affecting intercourse, invidious, and inviting retaliation from other States or foreign powers."

It is respectfully submitted that there is nothing in the language quoted to warrant the inference that "specific burdens" on the subjects mentioned were referred to. The chief justice was speaking of the power, claimed for the States, to tax *all persons and property found on their territory;* and can it be doubted that he meant to assert that a State tax *on all property* within its limits could not be levied on goods in transit through or from the State?

An attempt has already been made to show that the imposition of a tax on the transportation of goods through a State would not be the less invidious or the less calculated to invite retaliation from the States upon whose citizens the tax ultimately fell because it was imposed in the shape of a general tax upon transportation. This view of the case would perhaps be the

better appreciated by the Legislature of Pennsylvania if the citizens of that State were compelled to pay tribute to every State through whose territory they imported their goods.

The main object of conferring upon Congress the power to regulate commerce among the several States, was to put an end to the onerous and vexatious taxes and duties with which it had been burdened by State legislation. It does not seem to have occurred to the framers of the Constitution that the States might still continue to tax inter-State commerce notwithstanding the grant of this power to Congress; but perhaps there never has been a case yet where the validity of a State tax law has been questioned on the ground of its being a regulation of inter-State commerce, in which an attempt has not been made to show that the law was not a regulation of commerce, but merely an exercise of the State power of taxation. The present case is not exceptional in this respect, as will be seen by reference to the opinion of the Supreme Court of Pennsylvania, at page 294, &c., 12 P. F. Smith; but it is believed that no advantage can be derived from repeating the reasons which have again and again led this court to reject such reasoning.

But it will be said, as it has been said repeatedly before, that the statute in question only incidentally and indirectly affects inter-State commerce, inasmuch as the tax complained of is levied not on the goods transported, but on the business of the transporting companies.

This distinction, even if it were substantial,—which is not admitted,—does not in the least tend to show that the tax in question is not a regulation of commerce. On the contrary, the fact that the *transportation* itself, and not the *goods* transported, are taxed, renders the tax the more plainly a tax upon commerce. It is the very *commerce* itself that is taxed, and not the *subjects* with which it deals. The imposition of a tax on every ton of coal mined in Pennsylvania would not be a tax on commerce; but a tax on the transportation of the coal from the mines to the consumer is as clearly a tax on the commerce in coal as any that can be imagined.

"The counsel for the appellees," said Chief Justice Marshall, in Gibbons *vs.* Ogden, 9 Wheat., 189, "would limit it to traffic, buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce undoubtedly is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals in the actual employment of buying and selling, or barter."

Commerce between nations, or among States, has several branches. Martens, in his Summary of the Laws of Nations, says:—"It consists in selling the superfluity; in purchasing articles of necessity, as well productions as manufactures; in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight." McLean, J. Passenger Cases, 7 Howard, p. 416.

In Webster's Dictionary, commerce is defined as "The exchange of commodities on a large scale between different places and communities."

In Brown *vs.* The State of Maryland, where a statute law requiring an importer of foreign goods to pay a tax, and take out a license before selling his transportations, was held to be in conflict with the constitutional prohibition against the States levying imposts or duties on imports or exports, as well as with the reservation to Congress of the right to regulate commerce. Chief Justice Marshall, when treating of the latter provision, said:—"The distinction between a tax on the thing imported and on the person of the importer can have no influence on this branch of the subject. It is too obvious for controversy, that they interfere equally with the power to regulate commerce."

"Commerce with foreign nations and among the several States can mean nothing more than intercourse with those nations and among those States for the purposes of trade, be the object of the trade what it may, and *thus intercourse must include all the means by which it can be carried on, whether by the free navigation of the waters of the several States, or by a passage overland through the States, where such passage becomes necessary to the commercial intercourse between the States.*" Washington, J., in Corfield *vs.* Coryell, 4 Washington C. C. Repts., p. 379.

"The regulation of commerce includes intercourse and navigation." Nelson, J., Pennsylvania *vs.* The Wheeling Bridge Company, 18 Howard, p. 431.

"But it seems to have been overlooked," said Chief Justice Beasely, in The Erie Railway Company *vs.* The State of New Jersey, *ut supra*, "that the transportation is as much a part of such commerce as the goods themselves are. If there can be no commerce between the States without goods, so there can be none without the transportation of goods. The two must be united to constitute inter-State commerce. So it is not certain, then, that a duty on one of these two elements in commerce must, in the nature of things, operate as a tax upon the other. As commerce, the two things are indissoluble; are they divisible for the purpose of taxation? I think it may be laid down as a general rule, universally applicable to all cases arising under the clause of the Constitution now considered, that whenever the taxation of a commodity would amount to a regulation of commerce, so will the taxation of an inseparable incident, or a necessary concomitant of such commodity. The object being to protect the merchandise from all exactions in its transit over a State, by a rule of construction, as necessary as it is elementary, we must imply a protection to the means required to effect such a passage, because, without such implication, the privilege intended to be secured is defeated."

That the *transportation* of freight was intended by the Legislature to be the subject of the tax is as clear as words can make

it. The act provides that "Where the same freight shall be carried over and upon different but continuous lines, said freight shall be chargeable with tax, as if it had been carried but upon one line, and the whole tax shall be paid by such one of said companies as the State treasurer may select and notify thereof. Corporations whose lines of improvements are used by others for the transportation of freight, and whose only earnings arise from tolls charged for such use, are authorized to add the tax hereby imposed to said tolls, and collect the same therewith; but, in no case, shall tax be twice charged on the same freight carried on or over the same line of improvements."

A tax upon goods is not *per se* a tax upon commerce, much less upon inter-State commerce in the goods, for they may never become subjects of commerce; but how the transportation of goods from a consignee in the State to a consignee out of the State can be taxed without taxing, and therefore regulating, inter-State commerce, is not easily seen. It may be that in either case the consignee will ultimately have to pay the tax; but how does this prove that a tax may be lawfully laid upon inter-State commerce? Is it not a sufficient answer to such an argument to say that the Constitution forbids the tax in one case and not in the other? The Constitution says that "no State shall, without the consent of Congress, lay any duty of tonnage." Is it proved that a State may lay a duty on tonnage when it is shown that every article of which a ship is composed might lawfully have been made the subject of taxation by the State? Can a State tax imports because a tax upon the income of the importer would ultimately fall upon his customers, and a general tax upon the income of her citizens may lawfully be levied by the State?

Indeed, the case of the Commonwealth would be stronger if it could be shown that the statute was intended to tax the goods themselves, and not the transportation of them; if it had provided that all goods in transit from or through Pennsylvania should be detained at the boundary line until the consignees paid a tax as an equivalent for the protection which the laws of Pennsylvania

had afforded them. It might then be urged with some plausibility that the question was simply as to the right of a State to tax property within its jurisdiction, irrespective of all other considerations. It is very likely that such a practical exercise of State power would be followed by Congressional interference, but Congress could only interfere under its constitutional authority to regulate commerce between the States, and it would have to be shown that the statute of the State was an usurpation of that authority. The principle that the constitutional restrictions upon the powers of the States cannot be evaded by indirection would, however, relieve the case from any difficulty.

In Brown *vs.* Maryland, Chief Justice Marshall, when replying to the objection taken there that the tax was not upon the article imported, but upon the occupation of the importer, said:—

"It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition, which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that the tax on the sale of an article imported only for sale, is a tax on the article itself. It is true that the State may tax occupations generally; but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician or the mechanic must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it. So a tax on the occupation of an importer is in like manner a tax on importation. It must add to the price of the article, and be paid by the consumer or by the importer himself in like manner as a direct duty on the article itself would be made (paid?). This the State has no right to do, because it is prohibited by the Constitution."

"It is a just and well-settled doctrine, established by this court," said Grier, J., in the Passenger Cases, 7 How., 458, "that a State cannot do that indirectly which she is forbidden

by the Constitution to do directly. If she cannot levy a duty or tax from the master or owner of a vessel engaged in commerce, graduated on the tonnage or admeasurement of the vessel, she cannot effect the same purpose by merely changing the rates and graduating it on the number of masts or of mariners, the size and power of the steam-engine, or the number of passengers which she carries. We have to deal with things, and we cannot change them by changing their names. Can a State levy a duty on vessels engaged in commerce and not owned by her own citizens, by changing its name from a 'duty on tonnage' to a tax on the master? or an impost on imports, by calling it a charge on the owner or supercargo, and justify the evasion of a great principle by producing a dictionary or a *dictum* to prove that a ship captain is not a vessel, nor a supercargo an impost?"

In Almy *vs.* California, (24 How, 169,) a tax upon a bill of lading was held to be substantially and really a tax upon the exports for which the bill of lading was to be used. "If the tax," said Chief Justice Taney, "was laid on the gold or silver exported, every one would see that it was repugnant to the Constitution of the United States, which in express terms declares 'No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.' But a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing; for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another."

This reasoning applies *a fortiori* to a tax upon the transportation of articles destined for exportation. Goods may be exported without the use of a bill of lading; but they certainly cannot be exported without some mode of transportation being used. And it may be incidentally remarked here, that although the construction given by the court in Almy *vs.* California to

the meaning of the word "import," in that clause of the Constitution which says that "No State shall lay any imposts or duties on imports or exports," was not adopted by the present court in Woodruff *vs.* Parham, 8 Wallace, 123, yet it is there said that "the case was well decided on the ground taken by Mr. Blair, counsel for the defendant, namely, that such a tax was a regulation of commerce, a tax imposed upon the transportation of goods from one State to another over the high seas, in conflict with that freedom of transit of goods and persons between one State and another which is within the rule laid down in Crandall *vs.* Nevada, (6 Wallace, 35,) and with the authority of Congress to regulate commerce among the States."

That a tax either on the transportation of goods or on goods themselves while being transported must ultimately be paid by the consumer is too clear for argument.

"But this tax," said Chief Justice Beasley, in Erie Railway Company *vs.* New Jersey, *ut supra*, when speaking of the transit duty on transportation in question in that case, "is not only thus specific and restrained to this one class of objects, but it is also graduated by the weight of the thing carried. The business is charged a certain sum for the transportation of every ton of goods. The tax therefore is regulated, both as to its object and amount, by the articles transported. Now, it is impossible not to perceive that the effect of such a tax must be, so far as respects the owner of such articles, precisely and in all its results the same as though the commodities themselves were directly taxed. The expense of the conveyance of such commodities from the place of production to the market, is as much an element entering into their salable value as is the cost of their production. If a distinctive tax were placed upon all persons employed in manufactories, in proportion to the receipt or value of the wares manufactured, no one would doubt that such a tax would fall upon such wares, and would be ultimately paid by the consumer. So, when this tax is laid on the transportation of the merchandise, there is no more room for doubt that, by the operation of well-known laws, it must pass

from the carrier to the thing carried, and, in the precise ratio of the statutory burthen, enhance their price in the market. The consumer must pay the custom, whether it be placed on the goods or upon their transportation. The result then is, that this imposition on the business of transportation, which, it is argued, is constitutional, produces the same effect—neither more nor less—upon the private business of the owner of the goods, as would be produced by a direct tax on the goods themselves, which latter form of taxation would be undeniably unconstitutional. This substantial identity in the results would seem to favor strongly an inference of the substantial identity in the causes producing them. The conclusion, from this course of reasoning, therefore is, that if the transportation of merchandise *in transitu* from State to State can be taxed by a State in the form of law now before this court, the constitutional provision under consideration affords no protection whatever to the owner of goods which are the subjects of such transportation."

The argument, however, which seems to have found most favor with the Supreme Court of Pennsylvania, is that the tax may lawfully be exacted as "compensation for the use of works constructed under the eminent domain of the State." In fact, the decision of the court is mainly, if not altogether, rested upon this ground.

Now it may be observed, in the first place, that the rivers of Pennsylvania were not constructed under the State power of eminent domain, and that the tax imposed by the statute on every ton of freight transported within the territorial limits of Pennsylvania, by a steamboat company, cannot be considered as a compensation for privilege of using the public works of the State. "The law," says Judge Pearson, in the case of The Commonwealth *vs.* The Erie Railway Company,—the first case under the act of 1864,—"applies alike to all means of transportation, whether on the navigable rivers passing through the State, the great lakes of the West, or any line of canal or railroad. If goods are started from Olean, in the State of New York, to be carried on the steamboats, or any other boats of a

transportation company, to New Orleans, they may be taxed by the ton, so soon as the boat with its freight crosses the line of Pennsylvania; and thus our great rivers be no longer free to the commerce of all the citizens of every State through which it passes. A steamboat company incorporated in Buffalo or Chicago, by the laws of the respective States, is engaged in transporting freight from one port to the other, and is so unfortunate as to require coal, or other fuel, when near Erie, goes into that port, and is taxed by the ton for all the freight on board. The same consequences would follow, should the boat stop at that place to receive or land freight. A like tax could be imposed by Ohio and Michigan, and thus the free commerce of the lakes, hitherto enjoyed by all citizens, be broken up."

In the second place, it must be borne in mind that the State has parted with the right to exact tolls for the use of the railroads and canals owned by the canal and railroad companies of Pennsylvania. The Philadelphia and Reading Railroad Company, and not the State of Pennsylvania, has the right to charge toll for the use of its railroads.

It cannot be supposed, therefore, that the Legislature of Pennsylvania really intended to exact a toll for the use of artificial roads or water-courses when they imposed the tax in controversy. The absence of any such intention is also made manifest by the fact. that the tax is not graduated by the length of transportation. A ton of freight which passes but a quarter of a mile through the territory of Pennsylvania is taxed as much as a ton which has been transported three hundred miles. The through freight of the Philadelphia, Wilmington and Baltimore, the Lake Shore, and New York and Erie lines is taxed as heavily as that of the Pennsylvania Railroad.

How then can the tax on transportation, levied by the act of 1864, be treated as compensation for the use of artificial highways, and what advance towards a proper determination of this case is made by discussing the question of the right of a State to demand toll for the use of the railroads and canals which she owns? Once admit that a tax on transportation

within or through the territory of a State may be sustained by treating it as a toll for the use of highways, and there is no limit to the burthens which may be imposed on inter-State commerce. What proportion of the commerce by land between the States of this Union is not carried on by means of artificial roads? and where ordinary county or State roads, the control of which has been retained by the Commonwealth, are used, the theory would be much more plausible than in the case of railroads and canals constructed by improvement companies.

Would the decision of this court in Crandall *vs.* Nevada have been in favor of the right of a State to tax passengers in transit from her territory if it had been argued that the tax was a compensation for the use of the road on which they were traveling?

3. If the tax in question has been shown to be a regulation of inter-State commerce, *the next point to be determined is whether it is not such a regulation as Congress alone can make.*

When we consider the circumstances which induced the people of the United States to confer upon Congress the power to regulate commerce among the several States, the evils that existed and were intended to be avoided, and the plain import of the words used in the Constitution itself, it seems strange that there should be any doubt on this subject.

What benefit could have been expected from investing Congress with the power to regulate inter-State commerce, if the States themselves were to retain the power—the exercise of which had proved so vexatious? It could not have been supposed that uniformity and system would be produced by introducing a new element of discord. If the regulations established by thirteen distinct legislatures were found to be inconvenient and oppressive, the interference of another legislature would seem to have been a most unfortunate plan of relief. The difficulty is not obviated by referring to the supremacy of the acts of Congress when constitutionally enacted. Admit that a State regulation of commerce must fall when it comes in conflict with a Federal regulation, yet it cannot be supposed that Congress was expected to adopt a system of commercial regulation which

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would anticipate and preclude every possible exercise of State power on the subject.

"The history of the times," said Johnson, J., in his concurring opinion in the great case of Gibbons *vs.* Ogden, 9 Wheaton, p. 226, "will therefore sustain the opinion that the grant of power over commerce, if intended to be commensurate with the evils existing and the purpose of remedying these evils, could only be commensurate with the power of the States over the subject. And this opinion is supported by a very remarkable evidence of the general understanding of the whole American people when the grant was made. There is not a State in the Union in which there did not at that time exist a variety of commercial regulations, concerning which it is too much to suppose that the whole ground covered by these regulations was immediately assumed by actual legislation under the authority of the Union. But where was the existing statute on this subject that a State attempted to execute? or by what State was it thought necessary to repeal these statutes? By common consent these laws dropped lifeless from their statute books for want of the restraining power that had been relinquished to Congress."

It is true that, in the case just referred to, the decision of the court was rested upon the ground that the law of New York, which gave to Livingston and Fulton the exclusive right to navigate the waters of the State of New York, was in conflict with the laws of the United States providing for vessels to carry on the coasting trade; and this was all that it was necessary to decide. The following extract, from the opinion of the chief justice by whom the opinion of the court was delivered, shows that the concurrent power of the States to regulate commerce was by no means recognized:—"It has been contended by the counsel for the appellant, that, as the word 'to regulate' implies in its nature full power over the thing to be regulated, it excludes necessarily the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they

were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to have introduced, as that on which it has operated. There is great force in the argument, and the court is not satisfied that it has been refuted."

And again, it is said by the same eminent judge, that "When each government (State or Federal) exercises the power of taxation, neither is exercising the power of the other. But when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce." 9 Wheaton, 199.

Indeed, the opinion of Chief Justice Marshall in this case contains as forcible an argument as can well be presented in favor of the exclusive jurisdiction of Congress regulating inter-State commerce.

It was forcibly said by Mr. Justice Grier, in summing up his conclusions in the case of Norris *vs.* The City of Boston, (one of the passenger cases,) 7 How., 464, "That Congress has regulated commerce and intercourse with foreign nations and between the several States, by willing that it shall be free; and it is therefore not left to the discretion of each State in the Union, either to refuse a right of passage to persons or property through her territory, or to exact a duty for permission to exercise it."

The idea that both Congress and the State governments may possess and exercise the right to regulate inter-State commerce is as anomalous as that of the power to direct the movement of an army being lodged in several commanders at the same time.

The power to regulate commerce among the several States is given to Congress in the same clause and in the same words by which the power to regulate commerce with foreign nations is given; and any argument against the exclusiveness of this

power in the one case must equally be applicable to the other. It is impossible to suggest any distinction. The grant in each case was made in the same language and under the same circumstances. Yet who would now contend that the State of Pennsylvania can regulate its commerce with Great Britain?

This view of the subject is forcibly expressed by the learned judge of the court below, in his charge to the jury.

It is not proposed to examine the various cases in which the extent of the jurisdiction of Congress over foreign and inter-State commerce has been discussed by the judges of the Supreme Court of the United States. It must be admitted that there has been no little conflict of opinion on the subject. In the opinion of Mr. Justice McLean, in Smith *vs.* Turner, (passenger case,) 7 How., 393, will be found a review of the previous decisions and opinions on this point. The learned judge asserts most emphatically the exclusiveness of the jurisdiction of Congress. To the same effect is the opinion of Justice Wayne, in the same case, page 410. He remarked that the majority of the court did not think it necessary to reaffirm with Justice McLean "what this court has long since decided,—that the constitutional power to regulate commerce with foreign nations, among the several States, and with the Indian tribes, is exclusively vested in Congress, and that no part of it can be exercised by a State;" and added, "I believe it to be so, just as it is expressed in the preceding sentence, and in the sense in which these words were used by this court in the case of Gibbons *vs.* Ogden, 9 Wheat., 198. All that was decided in that case remains unchanged by any subsequent opinion or judgment of this court. Some of the judges of it have, in several cases, expressed opinions that the power to regulate commerce is not absolutely vested in Congress; but they are individual opinions, without judicial authority to overrule the contrary conclusion as it was given by this court in Gibbons *vs.* Ogden."

In the course of his opinion, Judge Wayne gives a statement of the circumstances under which the case of Miln *vs.* The City of New York, 11 Peters, 102, was decided. It was there held

that "The act of the State of New York, which inflicts a penalty upon the master of a vessel arriving from a foreign port, who neglects to report to the mayor or recorder an account of his passengers, is not a regulation of commerce, but of police, and is not in conflict with the Constitution of the United States," and this decision, according to Judge Wayne, was undoubtedly that of a majority of the court. But he shows that a majority of the court—four judges out of seven—were of opinion that the power of Congress over commerce was exclusive; that the opinion of Mr. Justice Thompson, who had been appointed to deliver the judgment of the court, was objected to, on consultation, as containing expressions inconsistent with that view; and that the opinion of Mr. Justice Barbour, which was delivered as that of the court, did not, so far as anything therein contained was liable to the same objection, command the assent of a majority of the judges. An opinion afterwards written by Justice Baldwin, but accidentally omitted from the report of the case, is referred to as sustaining his (Mr. Justice Wayne's) recollection of the circumstances thus detailed.

The dissenting opinion of Justice Story, in Miln *vs.* New York, necessarily includes a vindication of the exclusiveness of the constitutional power of Congress to regulate commerce; and he adds that the views entertained by him had been concurred in by Chief Justice Marshall, who was on the bench when the case was first argued.

But, however discordant may have been the opinions of the judges of the Supreme Court upon the question, whether the power of Congress to regulate foreign or inter-State commerce is in all cases and under all circumstances exclusive, it may safely be stated that nothing can be found in the reported decisions of that tribunal to raise a doubt as to the unconstitutionality of any attempt on the part of the State governments to interfere with the free exchange, between the several States, of all articles that can be made the subjects of commerce, where such exchange is not in conflict with regulations established for sanitary or police purposes.

The distinction suggested by the judge who delivered the opinion of the majority of the court, in Cooley *vs.* The Board of Wardens, 12 How., 311, that "Whatever subjects of this power are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress," if applied to the present case would seem to conclude the question. The right of passage for persons or goods through, from, or into the several States of the Union, is certainly one of national importance, and especially a fit subject for national regulations, and it has been regulated by being left free and untrammeled. Whether the distinction referred to is to be considered as authoritatively established, may well be doubted. It appears to have commanded the assent of the majority of the court in the case in which it was announced, and to have led to a decision in favor of the validity of our Pennsylvania pilot laws, although they were admitted to be regulations of commerce. But in the recent case of The Steamship Company *vs.* Port Wardens, 6 Wallace, 31, (a decision which was approved in Crandall *vs.* Nevada, and Hinson *vs.* Lott; see the opinion of Mr. Justice Miller in the latter case, 8 Wallace, page 152,) we find it decided that "A statute of a State enacting that the masters and wardens of a port within it should be entitled to demand and receive, in addition to other fees, the sum of five dollars, whether called out to perform any service or not, for every vessel arriving in that port, is a regulation of commerce within the meaning of the Constitution, and also a duty on tonnage, and is unconstitutional and void;" and the reasoning on which this decision is based seems quite inconsistent with the theory that the States have any concurrent power to regulate inter-State commerce, except so far as it may be incidentally affected by quarantine or other like provisions.

"I shall not enter at large," says Mr. Justice Strong, in Minot *vs.* The Railroad Company, already cited, "upon a discussion of the much-debated question, how far the power given to Congress by the Constitution to regulate commerce among

the States is exclusive. Certain it is that in the earlier decisions of the Supreme Court it was said to be unlimited, and so exclusively vested in Congress that no part of it can be exercised by a State, except the power to regulate commerce completely internal, that is, entirely within a single State. Gibbons *vs.* Ogden, 9 Whea., 1, and the passenger cases, 7 Howard, 283. I am aware that it has often been argued, and sometimes intimated, in decisions that so far as Congress has not legislated on the subject, the States may regulate commerce, at least internal commerce. Of this I remark, in passing, that if they can it is difficult to see why they may not add regulations to foreign commerce beyond those made by Congress, for the power over both is vested in the Federal Legislature by the same words. But I apprehend it will be found on examination that the cases that have sustained State laws alleged to have been regulations of inter-State commerce have been those that related to bridges or dams across streams wholly within a State, or other kindred subjects—things only in a restricted sense commercial subjects. Wilson *vs.* Blackbird Creek Company, 2 Peters, 250; Gilman *vs.* Philadelphia, 3 Wallace, 713. They are exceptional. The subjects are such as, in the last-mentioned case it is said, "can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively." But, without pursuing this subject further, it may safely be said that none of them are like the present. They admit, and some of them assert, that whatever subjects of the power to regulate commerce are in their nature national, *or admit of one uniform system or plan of regulation*, may justly be said to be of such a nature as to require exclusive legislation by Congress. Surely passage and transportation through a State are of this nature. If not, it is unfortunate. It is of national importance that in regard to such subjects there should be but one regulating power, for if one State can directly tax persons and property passing through it, or indirectly, by taxing the use of means of transportation, every other may, and thus commercial intercourse between

States remote from each other may be destroyed. The produce of Western States may be effectually excluded from eastern markets, for though it might bear the imposition of a tax by one State, it would be crushed under the weight of many.

B. When this cause was argued before the Supreme Court of Pennsylvania, it was contended by the plaintiffs in error, then defendants in error, *that the tax attempted to be imposed upon transportation of freight destined for exportation beyond the limits of Pennsylvania was prohibited by the clause of the Constitution which forbids any State laying imposts or duties on imports or exports.* The cases cited were Brown *vs.* the State of Maryland, 12 W., 449; Almy *vs.* California, 24 How., 169; the State *vs.* North, 27 Mo., 465, where it was held that a State law requiring an importer of articles manufactured in other States to take out a license and pay a tax on the goods was unconstitutional, and Louisiana *vs.* Kennedy, 19 Louis. Ann. Repts, 397, where it was held that the State of Louisiana could not tax property brought there from other States of the Union, for sale or reshipment, until it had been mixed with and formed part of the common mass of the property of the State.

But since then it has been decided by this court, in Woodruff *vs.* Parham, 8 Wallace, 123, and Hinson *vs.* Lott, Ibid, 148, that the term import, as used in that clause of the Constitution which says that "no State shall levy any imposts or duties on imports or exports," does not refer to articles imported from one State into another, but only to articles imported from foreign countries into the United States. The court will probably, therefore, consider the question as closed; but it may not be uninteresting to remark that in the elaborate argument of the counsel for the defendants in the case in 19 Louisiana Annual Reports, it is shown that in a debate in the convention which framed the Constitution, Mr. Madison expressly said that to permit the encouragement of State manufacturers by impost duties would require duties "*not only on imports directly from foreign countries, but from other States in the Union, which would revive all the mis-*

chiefs experienced from the want of a general government over commerce," thus showing, contrary to the impression of the learned judge who delivered the opinion of the court in Woodruff *vs.* Parham, that at least in one instance the word "imports" was expressly used in the convention as applicable to articles imported into one State from another.

C. The plaintiffs in error finally contend *that the statute in question interferes with that freedom of transit of goods and persons between one State and another which must necessarily exist under a political organization like ours.*

This branch of the case is so fully discussed in the case of Crandall *vs.* Nevada, 6 Wallace, 35, that it is unnecessary to do more than refer to the opinion of Mr. Justice Miller in that case. It is true that the tax there declared unconstitutional was a tax on the passage of persons and not of property; but the reasoning of the court is as applicable to the one case as to the other; and in Woodruff *vs.* Parham, 8 Wallace, 138, the rule laid down in Crandall *vs.* Nevada is spoken of as securing "freedom of transit of *goods* and persons between one State and another."

The principle on which Crandall *vs.* Nevada was ruled has been previously asserted, and with peculiar emphasis, by Chief Justice Taney, in his opinion in the passenger cases. See 7 Howard, 492; and the decision itself has been followed by the Court of Errors and Appeals of Delaware in the case of Clarke *vs.* The Railroad Company, already referred to.

JAMES E. GOWEN,
ROBERT A. LAMBERTON,
For Plaintiffs in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

Writ of Error to the Supreme Court of Pennsylvania.

The Philadelphia and Reading Railroad Co.,
PLAINTIFF IN ERROR,

vs.

The Commonwealth of Pennsylvania,
DEFENDANT IN ERROR.

Paper Book of the Defendant in Error.

LEWIS WALN SMITH,
F. CARROLL BREWSTER,
For Defendant in Error.

A—1.

IN THE SUPREME COURT OF THE UNITED STATES.

WRIT OF ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

The Philadelphia and Reading Railroad Company, Plaintiff in Error,
vs.
The Commonwealth of Pennsylvania, Defendant in Error.

December Term, 1870.
No. 358.

PAPER BOOK OF THE PLAINTIFF IN ERROR.

This is a writ of error to a judgment of the Supreme Court of Pennsylvania, affirming the validity of a statute of the State of Pennsylvania, which was alleged to be repugnant to the Constitution of the United States.

ABSTRACT OF THE CASE.

On the 25th of August, 1864, an act of the General Assembly of the Commonwealth of Pennsylvania, entitled "An Act to provide additional revenue for the use of the Commonwealth," was approved by the Governor, the first section of which provided, "That the president, treasurer, cashier or other financial officer of every railroad company, steamboat company, canal company and slackwater navigation company, and all other companies now or hereafter doing business within this State, and upon whose works freight may be transported, whether by such company or by individuals, and whether such company shall receive compensation for transportation, for transportation and toll, or shall receive tolls only, except turnpike companies, plank road companies, and

bridge companies, shall, within thirty days after the first days of January, April, July and October of every year, make return in writing to the Auditor General, under oath or affirmation, stating fully and particularly the number of tons of freight carried over, through or upon the works of said company, for the three months immediately preceding each of the above-mentioned days; and each of the companies, except as aforesaid, shall, at the time of making such return, pay to the State Treasurer, for the use of the Commonwealth, on each two thousand pounds of freight so carried, tax at the following rates, viz: First, on the product of mines, quarries and clay-beds, in the condition in which said products may be taken therefrom, two cents; second, on hewn timber, animal food, including live stock, also, on the products of the forest, vegetable and other agricultural products, the value of which has not been increased by labor, three cents; third, on all other articles, five cents. Where the same freight shall be carried over and upon different but continuous lines, said freight shall be chargeable with tax as if it had been carried but upon one line, and the whole tax shall be paid by such one of said companies as the State Treasurer may select and notify thereof; companies whose lines of improvements are used by others for the transportation of freight, and whose only earnings arise from tolls charged for such use, are authorized to add the tax hereby imposed to said tax and collect the same therewith, but in no case shall tax be twice charged on the same freight carried on or over the same line of improvements: *Provided*, That every company now or hereafter incorporated by this Commonwealth, whose line extends into any other State, and every corporation, company, or individual of any other State, holding and enjoying any franchises, property or privileges whatever in this State, by virtue of the laws thereof, shall make returns of freight and pay for the freight carried over, through and upon that portion of their lines within this State, as if the whole of their respective lines were in this State."—See Pamphlet Laws 1864, page 988; Brightley's Purdon's Digest, page 1379, pl. 11.

On the 25th of October, 1866, the Auditor General and State Treasurer of the Commonwealth of Pennsylvania stated an account between the Commonwealth and the Philadelphia and Reading Railroad Company, "for tax on tonnage per act of August 25, 1864, for quarters ending December 31, 1865, and March 31,

and June 30, 1866," by which the company were charged as follows:

First class...	3,478,011	tons, tax,	2	cents per ton..	$69,560	22
Second do...	77,413	"	3	" ..	2,322	39
Third..do...	259,976	"	5	" ..	12,998	80

This account was based on returns made by the company which discriminated between freight transported to points within, and that exported to points without, the State of Pennsylvania. The latter, amounting to two millions three hundred and twenty-six thousand and ten tons of the first class, viz: "the products of mines, quarries and clay-beds, in the condition in which said products were taken therefrom," was returned under protest against its liability to taxation. The tax assessed on this class of freight amounts to $46,520, and forms the subject of the present controversy; the balance ($38,361 41) of the assessment having been paid without objection.

The railroad company appealed from this settlement to the court of common pleas of Dauphin county, of Pennsylvania—the appeal being taken under the provisions of the eleventh section of the act of March 30th, 1811, (Brightley's Purdon, page 822, pl. 20,) and being accompanied by a specification of the objections on which it was granted, as required by the act referred to.

These objections alleged that the act of August 25, 1864, to the extent that it imposed a tax on freight other than that both received and delivered within the State of Pennsylvania, was unconstitutional and void, because, among other reasons, it was in conflict with the fourth paragraph of the eighth section of the first article of the Constitution of the United States, (which provides that "Congress shall have power to regulate commerce with foreign nations and among the several States,") and with the second paragraph of the tenth section of the same article, (which provides that "no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.")

BRIEF OF ARGUMENT FOR DEFENDANT IN ERROR.

The judgment from which this appeal has been taken is one recovered by the Commonwealth of Pennsylvania against the defendants below, for taxes due her, under an act, entitled "*An Act to provide additional revenue for the use of the Commonwealth.*" Pamphlet Laws, 988, 1864. The section imposing the tax levied against the defendants below, reads thus:

The president, treasurer, cashier or other financial officer of every railroad company, steamboat company, canal company, and slack-water navigation company, and all other companies now or hereafter doing business within this State, and upon whose works freight may be transported, whether by such company or by individuals, and whether such company shall receive compensation for transportation, for transportation and toll, or shall receive tolls only, except turnpike companies, plank road companies and bridge companies, shall, *within thirty days after the first days of of January, April, July and October of every year*, make return in writing to the Auditor General, under oath or affirmation, stating fully and particularly the number of tons of freight carried over, through or upon the works of said company, for the three months immediately preceding each of the above-mentioned days; and each of said companies, except as aforesaid, shall, at the time of making such return, pay to the State Treasurer, for the use of the Commonwealth, on each two thousand pounds of freight so carried, tax, at the following rates, viz: First, on the product of mines, quarries and clay-beds, in the condition in which said products may be taken therefrom, two cents; second, on hewn timber, animal food, including live stock, also on the products of the forest, vegetable and other agricultural products, the value of which has not been increased by labor, three cents; third, on all other articles, five cents. Where the same freight shall be carried over and upon different but continuous lines, said freight shall be chargeable with tax as if it had been carried but upon one line, and the whole tax shall be paid by such one of said companies as the State Treasurer may select and notify thereof. Corporations whose lines of improvement are used by others for the transportation of freight, and whose only earnings arise from tolls charged for such use, are

authorized to add the tax hereby imposed to said tolls, and collect the same therewith; but in no case shall tax be twice charged on the same freight carried on or over the same line of improvements: *Provided*, That every company now or hereafter incorporated by this Commonwealth, whose line extends into any other State, and every corporation, company or individual of any other State, holding and enjoying any franchises, property or privileges whatever in this State, by virtue of the laws thereof, shall make returns of freight, and pay for the freight carried over, through and upon that portion of their lines within this State, as if the whole of their respective lines were in this State.

Before considering the points of law raised by the plaintiffs in error, to show the alleged unconstitutionality of the tax, it is of importance to discern from the words of the act the exact practical working of the tax in its execution.

First. It is an act to raise additional revenue, and the mode of the collection of the tax is identical with the collection of the other taxes to which the Commonwealth looks for nearly all her revenue. The officers of the corporation return to the Auditor General the number of tons carried by it every three months, and the Auditor General settles a tax against the corporation in proportion to the size of the business transacted. He does this the same as he does in the case of a tax on the income, the dividends or the gross receipts of the company.

Second. The tax is imposed on all the corporations in the State, and is charged against each of them in proportion to all the tons carried, without any discrimination between those carried exclusively within the State, or those intended for transportation abroad.

Third. The company is allowed thirty days after the end of each quarter in which to report the number of tons carried, and sixty days more in which to pay the tax settled, so that the goods carried have all of them, before this tax becomes due or payable, passed beyond the jurisdiction of the State, if they were intended for shipment abroad, and no claim or lien whatever has attached to them. It is the franchise of the corporation which is liable for the non-payment of the tax.

Fourth. The tax, although familiarly called a "tonnage tax," is, in actual results, a tax on the corporation, graded by the amount of business it transacts in its province of transporter; and if the

term "tonnage tax" implies it is a tax on a ton, it is erroneous, the 2,000 pounds which go to make up a Pennsylvania ton being merely a convenient standard whereby to measure the business done by the corporation.

If this tax from which the plaintiffs in error are now seeking to escape be unconstitutional, then it must be because it is the exercise of a power expressly and directly prohibited to the State by the Constitution of the United States. Every presumption is in favor of its legality. It is a means, and one of great importance, through which the State of Pennsylvania seeks to raise the funds necessary to the maintenance of the administration of the government of the State. Taxation for such a purpose is the exercise of a high and unquestioned privilege of a sovereign, and no far-drawn analogy or dubious passage can be allowed to rob her of the right which is absolutely vital to her existence as a State—the right to raise revenue by taxation. It must be conceded that unless affirmatively prohibited, every State has a right to tax all persons and things within her jurisdiction.

License Case, 5 *Howard*, 615, *J. Daniel.*—"It cannot correctly be maintained that all State laws which may remotely or incidentally affect foreign commerce, are on that account to be deemed void. To render them so, they must be essentially and directly in conflict with some power clearly invested in Congress."

Passenger Cases, 7 *Howard*, *J. Catron.*—"It is also insisted that the State may tax all persons and property within their respective jurisdictions, except in cases where they are affirmatively prohibited. This is a truism not open to denial."

Ibid, *page* 492, *J. M'Clean.*—"A State cannot regulate foreign commerce, but it can do many things which more or less affect it. It may tax a ship or other vessel used in commerce, the same as other property owned by its citizens. A State may tax the stages on which the mail is transported, but this does not regulate the conveyances of the mail any more than taxing a ship regulates commerce. And yet, in both instances the tax on the property in some degree affects its use."

Biddle vs. Commonwealth, 13 *S. & R.*, *p.* 408-9, *C. J. Tilghman.*—"The prohibition (to tax imports) must not be carried beyond the plain meaning of the words. It is necessary that the States should have a revenue of their own. All objects, therefore,

within the boundaries are subject to their taxation, unless plainly exempted by the Constitution. All trades and occupations by which men acquire a livelihood are objects of taxation."

Erie Railroad vs. State of New Jersey, Com. Law Reg., Feb., 1866, *C. J. Bearley, page* 240.—"It certainly cannot be denied that a State may levy taxes that may incidentally affect commerce between the States. Indeed, it is perhaps impossible to imagine any tax which, in theory at least, may not be said to have incidentally such effect. That this class of taxes is legal, upon both general and constitutional considerations, no one doubts."

Society for Saving vs. Coite, 6 *Wallace*, 604, *J. Clifford.*—"All subjects over which the sovereign power of a State extends are, as a general rule, proper objects of taxation. Unquestionably the taxing power of the States is very comprehensive and pervading, but it is not without limits."

Passenger Cases, 7 *Howard*, 480, *C. J. Taney.*—"They (the States) are expressly prohibited from laying any duty on imports or exports, except what may be absolutely necessary for executing the inspection laws and also for laying tonnage duty. So far the taxing power over commerce is restrained, but no further. They retain all the rest; and if the money demanded is a tax upon commerce or the instrument or vehicle of commerce, it furnishes no objection to it unless it is a duty on imports or a tonnage duty, for these alone are forbidden."

To show here what the reserved rights of a State are, it is only necessary to look at the admitted relations of the States to the Union at the time of the adoption of the Federal Constitution. When (in 1787) they ratified that instrument, each one of them had vested in her all the rights of the sovereign, which, by the Declaration of Independence, became the property of the State, the same as previous to 1776, they had been possessed by the King of Great Britain. When they ratified the Constitution they only delegated to the general government those portions of their powers expressly set forth in the compact. All the other rights and prerogatives remained in them or in the people.—*Amendments to the Constitution, Art.* 10; *M'Ilvaine vs. Coxe*, 4 *Cranch*, 209; *Cohens vs. Virginia*, 6 *Wheaton*, 414; *Briscoe vs. Bank of Kentucky*, 11 *Peters*, 258. Within its own sphere, each government, that of the United States and that of the States, is sovereign. In

exercising its power within that sphere, its acts are governed only by its own pleasure.—*Gibbons vs. Ogden*, 9 *Wheaton*; *M'Cullough vs. Maryland*, 4 *Wheaton*, 316; *Bank of U. S. vs. Daniel*, 12 *Peters*, 33; *Bank of Augusta vs. Earle*, 13 *Peters*, 520; *Briscoe vs. Bank of Kentucky*, 11 *Peters*, 258; *Ohio Life Insurance Co. vs. Debitt*, 16 *Howard*, 428; *Dodge vs. Worlsey*, 18 *Howard*, 849; *Alleman vs. Booth*, 21 *Howard*, 506.

And this view of the relation of the States to the national government received an affirmance, and is stated with great preciseness and force in the recent case of *Buffington vs. Day*, decided in April, 1871, by this Court, the decision in which was delivered by Justice Nelson, but which is not yet reported. Speaking of the presumptions in favor of the rights of the States under the Constitution, he says:

"That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: 'The powers not delegated to the United States are reserved to the States, respectively, or to to the people.' The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication. The general government and the States, although both exist within the same terrestrial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former, in its appropriate sphere, is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government, within its sphere, is independent of the States. The relations existing between the two governments are well stated by the present Chief Justice in the case of *Lane county vs. Oregon*, 7 Wall, 76. 'Both the States and the United States,' he observed, 'existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting with ample powers directly upon the citizens, instead of the confederate government, which acted, with powers greatly restricted, only upon the States. But, in many of the articles of the Constitution, the necessary existence of the States,

and, within their proper sphere, the independent authority of the States, are distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them, and to the people, all powers, not expressly delegated to the national government, are reserved.'

"Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that without them the general government itself would disappear from the family of nations, it would seem to follow as a resonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired; should not be liable to be crippled, much less defeated, by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax, and more especially those means and instrumentalities which are the creation of their sovereign and reserved rights. Without this power and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence."

If, then, the present disputed tax is unconstitutional, it must be because it is within the expressed prohibition of the Constitution of the United Siates. It must either be such "a regulation of commerce" as a State cannot make, or else it must be "an import or duty on imports or exports or a tax on tonnage." Let us examine it in respect to both these lights.

A. Is it such a regulation of commerce as is in violation of the Constitution of the United States?

In considering it as coming within the scope of the fourth paragraph of the eighth section of the first article of the Constitution, the defendant in error maintains:

First. If it is a "regulation of commerce," the State of Pennsylvania has a right, under the clause referred to, to make such regulation, Congress not having forbidden the same by legislation.

The clause which vests in Congress the power to regulate commerce does not, *ipso facto*, take from the States the right to also regulate commerce, provided that the regulations of the latter do

exercising its power within that sphere, its acts are governed only by its own pleasure.—*Gibbons vs. Ogden*, 9 *Wheaton*; *M'Cullough vs. Maryland*, 4 *Wheaton*, 316; *Bank of U. S. vs. Daniel*, 12 *Peters*, 33; *Bank of Augusta vs. Earle*, 13 *Peters*, 520; *Briscoe vs. Bank of Kentucky*, 11 *Peters*, 258; *Ohio Life Insurance Co. vs. Debitt*, 16 *Howard*, 428; *Dodge vs. Worlsey*, 18 *Howard*, 849; *Alleman vs. Booth*, 21 *Howard*, 506.

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and, within their proper sphere, the independent authority of the States, are distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them, and to the people, all powers, not expressly delegated to the national government, are reserved.'

"Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that without them the general government itself would disappear from the family of nations, it would seem to follow as a resonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired; should not be liable to be crippled, much less defeated, by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax, and more especially those means and instrumentalities which are the creation of their sovereign and reserved rights. Without this power and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence."

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First. If it is a "regulation of commerce," the State of Pennsylvania has a right, under the clause referred to, to make such regulation, Congress not having forbidden the same by legislation.

The clause which vests in Congress the power to regulate commerce does not, *ipso facto*, take from the States the right to also regulate commerce, provided that the regulations of the latter do

not come in conflict with those of the former. If there be any conflict, it is conceded that the State law at once falls. But in the present case no such question arises. Congress has not passed any law regulating commerce between the States, there can, therefore, be no conflict with a superior enactment, and the only question remaining is, whether the power of regulating commerce vested in Congress is exclusive. It is submitted that there is no decision of this court which can be said to so decide. Analogies may be drawn or the individual dicta of judges cited, but there is no judicial decision which settles the question. On the other hand, wherever the issue has been presented it has been studiously avoided, and express declarations from the bench abound in all the reports, disclaiming any intention of so deciding. When an opportunity has offered for such decision the court has gone out of its way to avoid conveying any such impression. On the other hand, the opinions of a large majority of the judges, taken from their decision, bear strongly towards the doctrine that until Congress sees fit to exercise the power vested in it, the States have a right to regulate commerce, so far as the same are local in their nature, and do not arrive to a national rule.

Sturgess vs. Crowinshield, 4 *Wheaton*, *p.* 122.—"Since the adoption of the Constitution of the United States, a State has authority to pass a bankrupt law, provided it does not impair the obligations of contracts, or conflict with any act of Congress on the subject."

Marshall, C. J., p. 192, *asks:* "Whether, since the adoption of the Constitution of the United States, any State has power to pass a bankrupt law, or whether that power is exclusively vested in Congress?"

P. 193.—"In some cases, as in the making of treaties, we see an express prohibition, and this shows the sense of the convention to have been that the mere grant of a power to Congress did not imply a prohibition on the States to exercise the same power," (except where, from nature it must be exclusive.)

196.—"The right of the States is not extinguished, but only suspended by an act of Congress on the subject."

Cooley, et al. vs. Port Wardens, 12 *Howard*, 299.—This was a case involving the constitutionality of the law requiring every vessel without a pilot to pay a certain forfeit. Mr. Justice Curtis, in considering whether it was a regulation of commerce, said: "It

becomes necessary, therefore, to consider whether this law of Pennsylvania, being a regulation of commerce, is valid. * * * The grant of commercial power to Congress does not contain any terms which expressly exclude the States from exercising an authority over its subject matter. * * * On the other hand, if it were admitted that the existence of this power in Congress, *like the power of taxation, compatible with the existence of a similar power in the States*, then it would be in conformity with the cotemporaneous exposition of the Constitution.—(Federalist, No. 32.) * * * * Now the power to regulate commerce embraces a vast field, containing not only many but exceedingly various subjects, quite unlike in their nature. Either absolutely to affirm or deny that the nature of this power requires exclusive legislation by Congress is to lose sight of the nature of the subjects of this power, and to assert, concerning all of them, what is really applicable but to a part. Whatever subjects of this power are, in their nature, national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

The tax levied under the act now in dispute can in no sense be considered a "national" subject. It is local in its effect and operation, and hence the power to regulate it is not exclusively in Congress.

Crandell vs. State of Nevada, 6 *Wallace*, 35.—The decision in this case affirms the decision in *Cooley vs. Wardens*, (12 *Howard*, 299,) and the rule there laid down that the States have concurrent power to establish regulations of commerce, (provided the subjects thereof are not national, and that the laws do not conflict with any act of Congress,) is affirmed. The court say: "It may be that under the power to regulate commerce among the States, Congress has authority to pass laws, the operation of which would be inconsistent with the tax imposed by the State of Nevada, but we know of no such statute now in existence. Inasmuch, therefore, as the tax does not itself institute any regulation of commerce of a national character, or which has a uniform operation over the whole country, it is not easy to maintain, in view of the principles on which those cases were decided, that it violates the clause of the Federal Constitution which we have had under review."

This decision virtually declares that the failure of the United States to pass any law regulating commerce between the States, leaves in the same States the right to pass such regulations as they may see fit, provided the same does not amount to a regulation of commerce of a national character. This decision overrules the former opinion of Johnson, J., in his concurring opinion in Gibbons *vs.* Ogden, 9 Wheaton, p. 226, even had that opinion been entitled to the weight of a judicial decision; and also overrules the explanation of Justice Wayne, of the circumstances of decision of Milne *vs.* the City of New York, 11 Peters, 102, and the opinion of the same justice in the *Passenger cases*, 7 *Howard*.

Gilman vs. The city of Philadelphia, decided in 1865, 3 *Wallace*, 713, is emphatic in its recognition of the principle we contend for. The opinion of the majority of the court covers the whole case now before the court, but its length renders a reference to it better than a quotation, proper here. However, the meaning of the decision is succintly stated by Clifford, J., in his dissent. He says:

"The precise doctrine advanced, as I understand the opinion, is that Congress has not passed any act regulating the navigation of the river, and that inasmuch as there is no federal regulation upon the subject, the law of the State Legislature authorizing the erection of the bridge is a valid law, even if the bridge be an obstruction to navigation, because the State law is not in conflict with any act of Congress giving protection to the otherwise paramount right of navigation."

License cases, 5 *Howard*, *p.* 578, *Taney*, *C. J.*—"The present case differs from Brown *vs.* Maryland, in this, that the former was one arising out of commerce with foreign nations, which Congress has regulated by law; whereas the present is a case of commerce between two States, in relation to which Congress has not exercised its power. Some acts of Congress have indeed been referred to in relation to the coasting trade, but these are to prevent smuggling, and do not regulate imports or exports from one State to another."

"The question then is, 'whether a State is prohibited by the Constitution of the United States from making *any* regulation of foreign commerce, or of commerce with another State, although such regulation is confined to its own territory, and made for its

own convenience or interest, and does not come in conflict with any law of Congress.'"

The conclusion of the Chief Justice is, that the State is not prohibited.

P. 584.—"In Wilson *vs.* Blackbridge Marsh Co., and in Gibbons *vs.* Ogden, the court held that a State law was not invalid merely because it made regulations of commerce, but that its invalidity depended upon its repugnancy to a law of Congress in pursuance of the power granted."

"Thus in Houston *vs.* Moore, 5 Wheaton, p. 1, it was held that the grant of power to the Federal Government to provide for organizing and disciplining the militia, did not preclude the States from legislating on the same question, provided the law of the State was not repugnant to the law of Congress."

P. 586.—"Upon the whole, therefore, the law of New Hampshire is, in my judgment, a valid one. For although the gin sold was an import from another State, and Congress have clearly the power to regulate commerce between the several States, yet as Congress has made no regulation on the subject, the State may lawfully regulate the traffic as soon as it is landed in its borders, and impose a tax, or license, or prohibit the sale altogether, as its policy may dictate."

Same case, Catron, J., p. 601, 604, 5. "This narrows the question to this: 'Whether the States have power to regulate their own mode of conveyance, among the States, during the time the power of Congress lies dormant, and has not been exercised in regard to such commerce.'" He cites Gibbons *vs.* Ogden, Brown *vs.* Maryland, p. 603, and says: "Neither of these cases touches 'the question of exclusive power,' and it is studiously avoided. Wilson, et al. *vs.* Blackbridge Marsh Co., 2 Peters, 259, cited: "If Congress had passed an act which bore upon the case, any act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows, we should feel not much difficulty in saying that a State law, *coming in conflict* with such an act, would be void." New York *vs.* Milne, 11 Peters, 102. Mr. Justice Catron endorses Judge Thompson's view, as being that of Chief Justice Marshall, and correct, and says: "As this case (2 Peters) was an adjudication on the precise question, 'whether the Constitution of

the United States, in itself, extinguished the power to interfere with navigation on tide-water; and, as it adjudged, in the case of Gibbons *vs.* Ogden, *that the power to regulate commerce included navigation* as fully as if the clause had expressed it in terms, it is difficult to say that this case does not settle the question favorably to the exercise of jurisdiction on the part of States, until Congress shall act on the same subject, and suspend the State law in its operations."

"As no general law of Congress has regulated commerce among the States, such a rule cannot apply here."

P. 607.—"Congress has stood by for sixty years and seen the States regulate the commerce of the whole country, more or less, at the ports of entry and at all their borders, without objection, and for this court now to decide that the power did not exist in the States, and that all they had done in this respect was void from the beginning, would overthrow and annul entire codes of State legislation on the particular subject."

P. 608.—"The power to regulate commerce between the States may be exercised by Congress, at pleasure, and the States cut off from regulating the same commerce, at the same time it stands regulated by Congress, but that until such regulation is made by Congress the States may exercise the power within their respective limits."

Same Case, *Woodbury*, *J.*, p. 621, 619, 625.—"Now can it be maintained that every law which tends to diminish the consumption of any foreign or domestic article is unconstitutional, and violates acts of Congress?" and dissents from the proposition.

If the proposition was maintainable, that without legislation by Congress, as to the trade between the States, (except that in coasting, as before explained, and to prevent smuggling,) anything imported from another State, foreign or domestic, could be sold of right in the package in which it was imported, not subject to license or any internal regulation of a State, it is obvious that the whole license system may be evaded and nullified, either from abroad or from a neighboring State.

"A prohibition to import is one, and a prohibition to sell without a license is another and entirely different thing. The first will affect foreign commerce on the voyage, the latter only the internal

business after the foreign importation is completed and on shore."

The license cases have been quoted from thus fully, because of the elaborate nature of the argument and opinions. And although the opinions cited may be said to be merely the sentiments of the judge who delivered it, yet in the absence of any judicial determination to the contrary, the individual opinions will almost to the level of *res adjudicata.*

City of New York vs. Miln, 11 *Peters*, 132, *Barbour, J.*, delivering the opinion of the court: "We shall not enter into any examination of the question, whether the power to regulate commerce be or be not exclusive of the States, because the opinion which we have found renders it unnecessary."—Page 139. "There is then no *collision* between the law in question and the acts of Congress just commented on, and, therefore, if the State laws were to be considered as partaking of the nature of a *commercial regulation*, it would stand the test of the most rigid scrutiny, if tried by the standard laid down in the reasoning of the court, quoted from the case of Gibbon *vs.* Ogden."

Same Case, Thompson, J., Concurring Opinion.—"In thel eading cases upon this question, where the State law has been held to be unconstitutional, there was an actual conflict between the legislation of Congress and that of the States upon the right drawn in question. And in all such cases the law of Congress is supreme, and the State law, though enacted in the exercise of powers not controverted, must yield to it. But in the case before us no such conflict arises. Congress has not legislated on the subject in any manner."—Page 149. "The case of Wilson *vs.* Blackbridge Marsh Co., 2 Peters, 251, is a strong case to show that a power admitted to fall within the power to regulate commerce may be exercised by the State until Congress assumes to exercise. * * * * The State law here operated upon the navigation of waters over which the power to regulate commerce confessedly extends, and yet the State law, not coming in conflict with any act of Congress, was held not to be unconstitutional, and was not affected by the *dormant* power to regulate commerce. By the same rule of construction, the law of New York, not coming in conflict with any act of Congress, is not void by reason of the dormant power to regulate commerce, even if it admitted that the subject embraced in that law fell within such

power." And cites as similarly deciding *Hunter vs. Moore*, 5 *Wheaton*, 1.

In fact, the whole opinion of the learned justice is a powerful argument in favor of the non-exclusive character of the power vested in Congress.

Wilson et al. vs. Blackbridge Creek Marsh Co., 2 *Peters*, 251.—Marshal, C. J., delivered the unanimous decision of the Court: "The counsel for the plaintiffs in error insist that it comes in conflict with the power of the United States to regulate commerce with foreign nations and among the several States. If Congress had passed an act which bore upon the case, an act in execution of the power to regulate commerce, the object of which was to control State legislation over the small navigable creeks into which the tide flows, we should feel not much difficulty in saying that a State law coming in conflict with such an act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States, a power which has not been so exercised as to affect the question."

Passenger Cases, 7 *Howard*, 283.—These cases were decided by a divided Court, but five out of nine judges concurring. Wayne, J. P., 411, states that "we and the other four judges do not think it necessary to re-affirm the exclusive power of Congress, and that no part of it can be exercised by a State." This opinion, however, seems to be an extra judicial dictum, based upon the learned judges' views of the meaning of the decision of *Gibbons vs. Ogden*. Taney, C. J., however, in same case, page 499, denies that Gibbons *vs.* Ogden is in favor of exclusive power of Congress to regulate commerce, and Woodbury, J., in the same case, page 500, takes a similar view. The opinion, that of Justice Wayne, cannot be considered as a judicial decision. On the contrary, Taney, C. J., in his dissenting opinion, rests the case on this question: Has Congress the right to determine who shall be admitted into the several States, or can the States exclude? And, p. 479, denies exclusive commerciol power in Congress, and favors doctrine of non-conflict, and cites License cases, 5 How.

Same cases, page 539, Woodbury, J., goes into an exhaustive argument of the question of the exclusive power of Congress to

regulate commerce between the States; denies the doctrine of exclusive commercial power in Congress.

P. 558-9.—"When I say much was left and meant to be left to the States in connection with commerce, I mean in local matters, inseparable in some respects from foreign commerce, but not in conflict with anything Congress has already done."

Same cases, Woodbury, J., p. 540.—If taking another objection to it as a tax, and arguing against the tax imposed on the vessel, because it may be abused, to injure emigration and thwart the general government, it would conflict with no particular clause of the Constitution or acts of Congress. It must also be remembered that this was one of the objections to the license laws in 5 Howard, and that the court held unanimously that they were constitutional, though they evidently tended to diminish the importation of spirituous liquors, and lessen the revenue of the general government from that source. But that being only incident to them, and not their chief design, and the chief design being within the jurisdiction of the States, the laws were upheld."

P. 618.—"It is not enough to fancy some remote or indirect repugnance to acts of Congress—a potential inconvenience in order to annul the laws of sovereign States, and overturn the deliberate decisions of State tribunals, is requisite. There must be an actual collision or direct inconsistency, and that deprecated case of 'clashing sovereignties,' in order to demand a judicial interference of this court to reconcile them."—Cites 4 Wheaton, 318, 487, 1 Story's Com. on Const., 432.

Again, in the same cases, page 559, the learned judge says: "It seems to be no where settled that this power is exclusive in Congress, so that the States can enact no law on any branch of the subject, whether conflicting or not with any acts of Congress, but on the contrary, the majority of the court in the license cases (5 Howard, 504) appear to have held that the power is not exclusive as to several matters in some degree connected with commerce. The case of New York *vs.* Milne, (11 Peters, 141,) seems chiefly to rest on a like principle.

P. 565, cites Gibbons *vs.* Ogden, 9 Wheaton, as sustaining same view.

Commonwealth vs. New Bedford Bridge Company, 2 *Gray*,

339.—"Acts of Legislature authorizing the erection of bridges over navigable rivers are not unconstitutional, as interfering with power to regulate commerce granted to Congress, '*provided such enactments do not interfere with the regulations of Congress on the same subject.*'"

Lunham vs. Lamphere, 3 *Gray*, 272.—An act regulating the time and manner of taking fish in the *sea* within the territorial limits of a State, is within its authority and binding on citizens of other States, and on vessels enrolled and licensed as fishing vessels, under the laws of the United States, "subject only to such powers as Congress may justly exercise in the regulation of commerce, foreign and domestic."

Freeholders, etc., vs. State, 4 *Zabriskie*, 728, *Elmer, J.*—"But it was insisted, also, that the ferry in question is a part of the means of carrying on commerce between two States of the Union, and that a regulation of the rates of fare for carrying passengers and goods is in effect a regulation of commerce, which belongs exclusively to Congress. The same objection is made in People *vs.* Babcock, 11 Wend., 587. And I entirely agree with the Supreme Court of New York, in holding it of no force. *Whether the power of regulating commerce between the States* is to be considered as exclusively vested in Congress, so that the Legislatures of the several States cannot, constitutionally, pass any law on the subject, although it may not conflict with any existing treaty or law of the United States, has not yet *been authoritatively settled by the Supreme Court of the United States.* But conceding to be so, the regulating of the *tolls of bridges* and fares of railroad and ferries, is, in no just sense, a regulation, and has never so been regarded."

Port Warden vs. Ship J. M. Ward, 14 *La. An.*, 289.—State act required warden to perform certain duties in regard to vessels, for which he was to receive certain fees, held constitutional. Not a regulation of commerce within the meaning of the United States Constitution, and moreover, the State may still legislate, if its acts do not conflict with those of Congress.

Commissioners vs. Cuba, &c., 28 *Ala.*, 185.—Power in Congress to regulate does not prevent State legislation which does not conflict with any act of Congress, in pursuance of this power.

Newport vs. Taylor, 16 *B. Mon.*, 699.—Denies that the commercial power of Congress is exclusive or prohibits State action, when in fact it has not been exercised.

Mitchell vs. Steelman, 8 *Cal.*, 363.—The power of Congress to regulate commerce is exclusive, *when exercised.*

Smith vs. Marsden, 5 *Texas*, 432.—The passenger cases not conclusive authority, there being great diversity of opinion, and a majority of one only in favor of the decisions made.

The view of the question favorable to the exclusiveness of Congressional power is sustained by the decision of this court in the case of Gibbons *vs.* Ogden, and by the divided court decision in the passenger cases. But the former case, so much relied on by the plaintiffs in error, was decided on the ground that the State grant of an exclusive right to the waters of a navigable river was in conflict with that branch of commerce as to which Congress has made direct legislation, and being repugnant to it must give way. Had the court been of the opinion that the grant was unconstitutional, merely because it was an attempt of a State to regulate commerce, the decision would have been based on that ground, but the court expressly avoided giving any such an opinion. So far as the latter cases are concerned, we have already remarked that the decision of the court was such as to greatly weaken the opinion, even had it been based exclusively on the ground of the exclusiveness of the power of Congress. It must be conceded that the leaning of the majority of the court in the earlier cases, of which *Brown vs. Maryland*, *Gibbons vs. Ogden* and *The Passenger Cases* are leading, seems to have been towards the idea that the power to regulate commerce between the States was exclusively vested in Congress, although it never was asserted as a judicial decision. But the later case of *Crandell vs. Nevada* and *Cox et al. vs. Lott*, decided at the present term, but not yet reported, are decided in their reversal of any such doctrine, and more than over-rule whatever authority the previous decisions might have had. In the case of *Cox vs. Lott*, Clifford, J., in delivering the unanimous opinion of the court, says:

"Prior to the adoption of the Constitution the States attempted to regulate commerce, and they also levied duties on imports and exports and duties of tonnage, and it was the embarrassments

growing out of such regulations and conflicting obligations which mainly led to the abandonment of the confederation, and to the more perfect Union under the present Constitution.

"Congress possesses the power to regulate commerce with foreign nations and among the several States, and it is well settled law that the word commerce, as used in the Constitution, comprehends navigation, and that it extends to every species of commercial intercourse between the United States and foreign nations, and to all commerce in the several States, except such as is completely internal, and which does not extend to or affect other States.—*Gibbons vs. Ogden*, 9 *Wheat.*, 193.

"Authority is also conferred upon Congress to lay and collect taxes, but this grant does not supersede the power of the States to tax for the support of their own governments, nor is the exercise of that power by the States, unless it extends to objects prohibited by the Constitution, an exercise of any portion of the power that is granted to the United States.

"Whether the act of laying and collecting taxes, duties, imposts, and excises was a branch of the taxing power or of the power to regulate commerce was directly under consideration in the case last cited, and it was conclusively settled that the exercise of such a power must be classed with the power to levy taxes. Had the Constitution, therefore, contained no prohibition, it is quite clear that it would have been competent for the States to levy duties on imports, exports or tonnage as they had done under the confederation."

This decision having, as it does, the weight of its recent deliverance, together with its unanimity on the part of the court, seems to settle the question in favor of the exercise of the power by the States, so long as Congress fails to regulate the inter-State commerce. Considering, then, that the great weight of opinion on the part of the judges, where they have expressed an opinion, has leaned so strongly towards the rights of the States, and the care taken by the court to avoid any judicial determination to the contrary, the defendant contends that even if the law be a regulation of commerce, it would not *ipso facto* be void.

Is there anything in the idea that a State can regulate inter-State commerce, if Congress omits to do so, which is inconsistent with the intent of the clause inserted in the Constitution giving

Congress the power to regulate commerce? We fail to see any such conflict. At the time of the adoption of the Constitution the commerce of the country was burdened by the imposition of imposts and exposts by the several States, and by the regulations of commerce imposed by them. The power to regulate commerce was vested in Congress, so that at any time it could pass a law regulating commerce, so as to relieve it from all the burdens so vexatious under the confederation. That power was given to Congress to exercise, should it see fit, and should the exigencies of the occasion require. To use a homely metaphor, the National Legislature had a whip placed in their hands to punish any local tyranny on the part of the States by exercising its prerogative. It has never seen fit to do so. As Justice Johnson says, in his opinion in Gibbons *vs.* Ogden, page 226, "all the laws bearing on commerce dropped lifeless from the statute book." Not necessarily because the power of regulating commerce had ceased to be in the States, but because each State knew that if it persisted in its impositions Congress would exercise the power, and thus cancel its laws by the passage of one paramount. The reason why all regulations of commerce by the States, obnoxious in their character, have ceased, for nearly a century, to exist, is found in the fact that Congress could at any time pass a law regulating inter-State commerce. The moment that the direful picture, drawn by the plaintiffs in error, should be painted in experience, Congress could exercise its power and sweep all such State laws into utter nullity. There is nothing, therefore, inconsistent with the retention of the power in the State, until Congress see fit to exercise it, with the object and purposes of the clause of the Constitution referred to. As long as the representatives of the people, who know the wants of the whole country, have it within their power to correct an evil, should it exist, so long is the evil virtually cured. The mere passage of a law declaring that no regulation of commerce, tending to diminish traffic between the States, shall be passed by a State, would at once affect the object sought for by the Constitution. Until such a law is passed the regulation of inter-State commerce, as far as the jurisdiction of the State extends over the object of commerce, and which is merely local in its character, is not forbidden by the clause of the Constitution giving Congress the power to regulate commerce.

But, say the plaintiffs in error, "what benefit could have been expected from investing Congress with the power to regulate inter-State commerce if the States themselves were to retain the power, the exercise of which had proved so vexatious?" The answer is simple: If Congress has the power to regulate commerce, and sees fit to exercise it, then all the State laws which conflict with national legislation fall. It is not a concurrent power given to Congress; it is a superior power. As soon as it is exercised, it does not act *with* the State laws; it over-rides and abolishes them. It is not "interference" of "another legislature" with the actions of "thirteen district legislatures." It is the abolition of the actions of thirteen by the passage, by a higher power, of a uniform system. And such a remedy for the evils of the confederation is not "unfortunate." Nor does the necessity of the case require that the federal regulation should be so drawn as to include every possible action of a State in regard to inter-State commerce. An act forbidding interference by the States, general in its terms, would indicate a desire on the part of Congress to exercise the power given to it, and make the States appear in the light of seeking to infringe on a delegated power, and not as they now do appear, as seeking to exercise a reserved right, with which Congress has never shown the slightest desire or intention to interfere.

2d. *The tax levied against the plaintiff in error is not such a regulation of commerce as to be included in the power given to Congress, supposing that power to be exclusive.*

In order that we may discover whether the act now alleged to be unconstitutional is a "regulation of commerce" it is necessary to see what is "commerce" and what amounts to a "regulation." We accept the definition of commerce given by the plaintiffs in error and taken from the decision of this court. "Commerce," says Chief Justice Marshall, in *Gibbons vs. Ogden*, "is undoubtedly traffic—but it is something more. It is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, *and is regulated by prescribed rules for carrying on that intercourse.*" And again he says: "It is the power to regulate, that is to prescribe the rules by which commerce is to be governed." This corresponds with the derivation of the word "regulate," and furnishes us with the key to what is meant by a regulation of commerce. "*Regula* a rule—Regulate, to adjust by

rule—as to regulate weights and measures—to regulate the assize of bread—to regulate trade."—*Webster.* We can, therefore, paraphrase the term "power to regulate commerce" by the words, "power to prescribe rules which govern the intercourse of one nation with another." Can the tax in question be considered in any way a rule to govern the intercourse of the people of Pennsylvania with those of other States? Does it make a rule to govern the shipment of a ton of coal passing out of the State? It clearly does not, for a ton of coal is shipped just as freely, without either the knowledge or interference of the State, as though there was no such law in force. It is not until months after the ton has been shipped that the State knows the fact—it is not until months later that the tax is payable by the company. How then can this be a rule to govern the intercourse. And the same reasoning applies to goods brought into the State from abroad. They are delivered to the consignees, and the packages broken and the goods sold before the railroad company is asked to pay the tax in question. There is nothing then which connects the tax with the goods or the intercourse. There can be no such thing as rule where there is nothing which it affects. It is essential to a regulation that it have something to regulate. But here it neither regulates the carrier, nor the shipper, nor the purchaser nor the goods transported. How then is it a regulation of commerce, when it does not affect any of the things that go to make up commerce? It is only by sublimating the meaning of commerce into the naked word "intercourse," and then maintaining that this tax *interferes* with "intercourse" by making the profits of the transporter less, and consequently removing from him a portion of the incentive to business, that this tax can be construed to mean a regulation of commerce. But if the rule of interpretation taken by this court is such, that anything is a regulation of commerce which tends to diminish the profits of transportation, then there is no tax levied by a State which is not within such a construction, and therefore invalid, for all taxation interferes more or less with production and consumption.

Should this tax be unconstitutional because of its remote relation to commerce with foreigners, then will almost all the sources of the State revenue fall under the same ruling, for, as is said by the *Chief Justice of New Jersey, Am. Law Reg., Feb.* 9, 1866,

"it is, perhaps, impossible to imagine any tax which, at least in theory, does not incidentally have such effect." The tax on net earnings and income, gross receipts, retailers' and sample licenses, broker licenses and foreign insurance agencies could all be made by the parties interested to fall proportionately under the same head. If the State cannot tax the receipts of a transportation company in proportion to the number of tons carried by it, and on which freight has been paid, then it cannot tax the dividends declared, for the dividends are portion of these very receipts, and derived from the same source, viz: Received from traffic intended to be sent abroad. The same rule applies to a tax on gross receipts, for all that portion of their receipts which are derived from shipment intended for foreign destination must be exempt. In fact the corporations of Pennsylvania are to-day contesting the tax on gross receipts, on precisely the same ground as that now taken by the plaintiffs in error.

If the plaintiffs be right, then it is difficult to see what is left for the State to tax. "It can lay no tax which will not more or less affect commerce; more or less prevent consumption, and without consumption there can be no commerce."—*Paddleford vs. Savannah*, 14 *Geo.*, 438. If the Commonwealth cannot tax the possessions of a corporation after they have come into the hands of the corporation, and probably been used by the corporation, because they were derived from freight on goods ultimately intended for transportation beyond the State, then can a like discrimination be made by citizens, by insurance agents, by almost every one who is now taxed, and the State be deprived of a large revenue, and a large amount of wealth in the State be exempted from all State taxation. Which is neither designed nor desired by the Constitution of the United States.

There must, therefore, be some point at which all will concur, that the power of a State to impose a tax which may affect commerce, by diminishing the profits of the transporter, is valid; otherwise the States would be left without a revenue. Now where does the power of Congress to regulate commerce begin, and that of the State to impose a tax cease? Fortunately the decisions heretofore made by this court affords a solution to this question. Taking the definition of a regulation of commerce which we have given, we find it to mean a rule to govern intercourse. If then any act

be passed by the State amounting to a *rule*, which either directly affects the goods, or the consignor or consignee, or the transportation of the goods or their sale, it can be considered a regulation of commerce. But any act of a State which taxes the business of any of its citizens, or franchise of any corporation, or their profits, and only interferes with commerce so far as to check consumption or diminish profits, does not amount to a rule to govern intercourse, and is a legitimate exercise of the rightful power of taxation never surrendered by the State to the Federal government. Taking this, then, as a standard, around which to classify the various decisions of the courts bearing on this subject, let us examine the conclusions arrived at. In the case of *Brown vs. State of Maryland*, 12 *Wheaton*, 419, so much relied on by the plaintiffs in error, a license was imposed by Maryland on every foreign importer, *before* he could break a package or sell any foreign goods. This was a *rule* which directly affected the sale of the goods, for before the sale took place it was necessary to comply with the rule, and the cost of the license was thus made a pre-requisite to engaging in foreign commerce. This was held unconstitutional, because by making a license a pre requisite to sale it clogged intercourse. It was a rule which affected directly that portion of commerce which consisted in selling imported goods. Had the State of Maryland required every merchant, at the end of every year, to pay a tax on the amount of profits he derived from his business, irrespective of what part of those profits were derived from internal trade and what came from foreign trade, can it be contended that anything in its decision leads to the inference that such a tax would have been held unconstitutional? On the contrary, we have a decision of the court in *Nathan vs. State of Louisiana*, 8 *Howard*, 73, directly opposite to the idea of the unconstitutionality of such a tax as that stated. In that case the State levied a tax on the *business* of foreign exchange brokers, and it was held constitutional.

M'Lean, J., p. 80.—"This is not a tax on bills of exchange. Under the law every one is free to buy or sell bills of exchange, as may be necessary in his business transactions; but he is required to pay the tax *if he engage in the business of money or exchange broker.*"

"That a State may tax its own citizens for the prosecution of

any particular business or profession within the State has not been doubted."

"Is a tax upon ship property, which is admitted to be an instrument of commerce, prohibited to the States?"

[A tax upon the ship or upon the profits derived from its use is the same—so a tax upon a railroad company, or upon the profits derived from its use ex. gr.—the transporting of goods for hire, is also the same.]

Page 82.—"The taxing power of the State is one of its attributes of sovereignty; and, where there has been no compact with the Federal government, or cession of jurisdiction for the purposes specified in the Constitution, this power reaches all the property *and business* within the State, which are not properly denominated the means of the general government; and, as laid down by this court, may be exercised at the discretion of the State. If this power of taxation by a State, within its jurisdiction, may be restricted beyond the limitations stated, on the ground that the tax may have some indirect bearing on foreign commerce, the resources of a State may be thereby essentially impaired. But State power does not rest on a basis so undefinable. Whatever exists in its territorial limits in the form of property, real or personal, with the exceptions stated, is subject to its laws; *and also the numberless enterprises in which its citizens may be engaged.*"

In this case the tax did not amount to a *rule* to govern foreign commerce, but was levied on the business after the foreign exchange had been negotiated. Had the tax been levied on every bill of foreign exchange before it could be negotiated by the broker, then the case would have come under the rulings of *Brown vs. Maryland.* The present case resembles closely that of *Nathan vs. Louisiana*, but has no features in common with that of *Brown vs. Maryland.* Examined in the light of this application we will find that none of the decisions of this court have ever gone so far as to interfere with State taxation, except in cases in which the tax was in such a form as to primarily be a rule to govern commerce, and only a tax in its secondary efforts. Applying this test the case of *Gibbons vs. Ogden*, 9 *Wheaton* 1, so much cited by the plaintiffs in error, ceases to bear against the right of the States to impose this tax. That was nothing but a direct regulation of commerce by reason of its operating on every steamboat which, in the course of commerce,

plied the Hudson river. It established a *rule* to govern intercourse between the States, by giving the right to that intercourse exclusively to the grantees of the State of New York. So also in *Almy vs. California*, 24 *Howard*, 172. That was the imposition by California of a stamp duty on every bill of lading of gold or silver exported. As the bill of lading was an essential part of every consignment, such a tax was equivalent to a direct tax on the gold or silver, the payment of which was necessary before the goods could become commodities of commerce. This was the establishment of a *rule to govern* the shipment of the particular articles. It was a tax only in its secondary effect, primarily it was an imposition on commercial intercourse. It had not the usual features of nearly every *bona fide* tax law, viz: a general imposition of duties for the raising of revenue. It singled out the articles principally exported and by levying the tax on them showed the intention was to clog commerce, by charging on it the cost of State expenses. It was, however, decided unconstitutional by this court, on the ground that it was a duty on exports.

Crandall vs. the State of Nevada, 6 *Wallace*, 35, is a striking illustration of this test. The law then in dispute levied a tax on transportation companies, at a rate per capita on every passenger leaving the State or passing through it. The court was not prepared to say that this was a regulation of commerce, and decided the case on other grounds. In that case, as the State looked to the carrier after the passenger had passed beyond its limits and did not directly clog commerce by establishing a rule to govern intercourse, the court was not prepared to hold it such a regulation of commerce as was contemplated by the Constitution, and only decided adversely to the law on principles entirely distinct from all connection with it being a regulation of commerce.

Steamship Co. vs. Port Wardens, 6 *Wallace*, 33.—The law of the State of Louisiana taxing every vessel entering the port of New Orleans five dollars, without regard to any preference of service by officers of the State or pilots, was held unconstitutional. The effect of the tax was the same as though, before any vessel could enter the port, she was compelled to pay five dollars for the privilege of entering. This was a rule to govern intercourse, and, of course, fell with the clause referred to.

Erie Railroad Co. vs. State of New Jersey, 2 *Vroom*, 531,

cited by the plaintiff in error, is another illustration. The act here complained of levied a transit duty on every passenger or ton carried through the State, except such as were transported exclusively within the State. Had the tax been a general one on all companies, irrespective of the destination of the goods carried, there is nothing in the opinion to warrant the belief that it would have been declared invalid. But when it made a discrimination against foreign goods it established a rule which affected directly inter-State commerce by putting it at a disadvantage with domestic transportation. In *Clarke vs. The Philadelphia, Wilmington and Baltimore Railroad Co.*, decided by the Court of Error and Appeals of Delaware, a law which taxes every passenger traveling within the State was held invalid, so far as passengers passing through or out of the State were concerned, on the ground of decision of *Crandall vs. Nevada. The Passenger Cases*, 7 *Howard*, establish the same rule—they were directly based on the ground that the law in question established a rule to govern intercourse.

Looking next at cases in which the laws of the various States have been upheld by this court, it will be found that many of them, although complained of as regulations of commerce, were decided as valid because they did not amount to a rule to govern intercourse, but merely affected intercourse secondarily, while their primary result was the exercise of a power undeniably vested in the State. And first among these is the case of *Willson vs. The Blackbird Creek Marsh Co.*, 2 *Peters*, 245, decided as early as 1829, in which Chief Justice Marshall (who had already written the opinion in *Brown vs. Maryland* and *Gibbons vs. Ogden*) delivered the unanimous judgment of the court. In that case the bridge was erected over a navigable stream, and entirely cut off all navigation. Yet it was held to be a constitutional exercise of a power never surrendered by the State of Delaware. While it might be an infringement of private rights, as between Delaware and Wilson, the plaintiff, for which the State might be liable to him in damages, yet it was not the duty of the court to consider that question, it being for the State courts. Although it is undisputed that the bridge interfered with intercourse, yet as it was primarily intended as a local improvement, and was an exercise of the right of the State, and its interference with commerce was the secondary effect of its erection, the act was lawful. It was not a rule to govern in-

tercourse. So also in *Milne vs. City of New York*, 11 *Peters*, 104, decided eight years later. In that case while it cannot be doubted that the imposition of penalties, by New York, against the captains of vessels failing to report the number of passengers, was a regulation of commerce, yet as it was not a rule to govern intercourse in its primary effect, but was the exercise of the police power of the State in the first place, and a regulation of commerce in the second place only, it was held constitutional. In *Grover vs. Slaughter*, 15 *Peters*, 449, the question of the constitutionality of an act forbidding the importation of slaves from any State into Mississippi was considered and the act sustained. It was intended as a local police measure, and while it might affect inter-State commerce still it was primarily an exercise of a right conceded to the State. But infinitely stronger is the case of *Cooley vs. Board of Wardens*, 12 *Howard*, 299, decided in 1851. The law of Pennsylvania, imposing upon every vessel entering the port of Philadelphia, which neglects or refuses to take a pilot, a forfeit of one-half pilotage, to go to the society for the Relief of Disabled Pilots, was held constitutional. "The power to regulate commerce includes various subjects, upon some of which there should be a uniform rule, and upon others different rules in different localities. The power is exclusively in Congress in the former, but not so in the latter." The power to regulate pilots is a regulation of commerce, but as the law was primarily local in its operations, and intended, in good faith, to be an exercise of an undoubted right of the State, its secondary effect on commerce did not make it illegal, and the decision is indorsed in *Crandall vs. Nevada*, 8 *Wallace*, 35, decided over sixteen years later. But still more decided in *Gilman vs. Philadelphia*, 3 *Wallace*, 713, decided in 1865. This settled the right of a State to erect a bridge over a navigable river even if it does interfere with navigation, provided Congress has not legislated on the subject, and that if the act of a State does not amount to a rule to govern intercourse, it may be lawfully enacted, even if it does interfere with commerce. The statement of the distinction is most clearly drawn in the words of the learned Justice who delivered the opinion, (Wayne J.,) 3 *Wallace*, 730. He says: "The States may exercise concurrent power in all cases but three. 1st. Where the power is lodged exclusively in the Federal Constitution. 2d. Where it is given to the United States and

prohibited to the States. 3d. Where, from the nature and subjects of the power, it must necessarily be exercised by the Federal Government exclusively." The power here in question does not, in our judgment, fall within either of these exceptions. It is no objection to distinct substantive powers that they may be exercised upon the same subject within their respective boundaries. In some instances their action becomes blended, in some the action of the State governments displaces the action of the Nation; in others the action of the State is void, because it seeks to reach objects beyond the limits of State authority.

"A State law, requiring an importer to pay for and take out a license before he should be permitted to sell a bale of imported goods, is void, and a State law which requires the master of a vessel, engaged in foreign commerce, to pay a certain sum to a State officer on account of each passenger brought from a foreign country into the State, is also void. But a State, in the exercise of its police force, may forbid spirituous liquor imported from abroad or from another State to be sold by retail, or to be sold at all without a license; and it may visit the violation of the prohibition with such punishment as it may deem proper. Under quarantine laws, a vessel registered, or enrolled and licensed, may be stopped before entering her port of destination, or be afterwards removed and detained elsewhere, for an indefinite period, and a bale of goods, upon which the duties have or have not been paid, laden with infection, may be seized under "health laws," and if it cannot be purged of its poison may be committed to the flames.

"The inconsistency between the powers of the States and the Nation, as thus exhibited, is quite as great as in the case before us; but it does not necessarily involve collision or any other evil. None has hitherto been found to ensue. The public good is the end and aim of both. If it be objected that the conclusion we have reached will arm the States with authority potent for evil, and liable to be abused, there are several answers worthy of consideration. The possible abuse of any power is no proof that it does not exist. Many abuses may arise in the legislation of the States which are wholly beyond the reach of the government. The safeguard and remedy are to be found in the virtue and intelligence of the people. They can make and unmake constitutions

and laws; and from that tribunal there is no appeal. If a State exercise and unwisely the power here in question, the evil consequences will fall chiefly upon her citizens. They have more at stake than the citizens of any other State. Hence, there is as little danger of the abuse of this power as of any other reserved to the States. Whenever it shall be exercised openly or covertly for a purpose in conflict with the Constitution or laws of the United States, it will be within the power, and it will be the duty, of this court to interpose with a vigor adequate to the correction of the evil. In the Pilot case the dissenting judge drew an alarming picture of the evils to rush in at the breach made, as he alleged, in the Constitution. None have appeared. The stream of events has since flowed on without a ripple due to the influence of that adjudication. Lastly, Congress may interpose, whenever it shall be deemed necessary, by general or special laws. It may regulate all bridges over navigable waters, remove offending bridges, and punish those who shall thereafter erect them. Within the sphere of their authority both the Legislature and judicial power of the nation are supreme. A different doctrine finds no warrant in the Constitution, and is abnormal and revolutionary."

We have quoted more fully from the decision in *Gilman vs. Philadelphia*, because in it the distinction between interference with commerce and a regulation of commerce, is clearly recognized by the court, and it furnishes so powerful an answer to the complaint that allowing the States power to interfere with inter-State commerce would lead to damaging evils in traffic. The *License cases in* 5 *Howard* also furnish a parallel distinction between the powers vested in the States, and those given exclusively to Congress. The tax on gin imposed by New Hampshire was a regulation of commerce, but coming within the power of a State to levy taxes, rather than under the head of a rule to govern intercourse, it was sustained.

From the various recent decisions of the court, we think it may be considered that, whatever may have been the tenor of the earlier cases, it is now settled that there are many forms of regulations which affect commerce which it is within the powers of the States to make, not excluding the cases of bridges, pilots, quarantine and police measures, all of which have been always recognized as being vested in the States as well as Congress. That there also belongs

to the States the right to pass laws which are in exercise of the reserved rights of the States, even if they be regulations of commerce, provided that the regulation be local in its nature and does not amount to a national rule, and one which uniformly affects the whole country. This conclusion is reached by the decision of the court in the last three cases in which the question has come before it, viz: *Cooley vs. Board of Wardens*, 12 *Howard*, 299, decided in 1853; *Gilman vs. City of Philadelphia*, decided in 1865, and *Crandall vs. State of Nevada*, in 1867. The rule there laid down and endorsed is in the latter case stated is: "Inasmuch, therefore, as the tax does not itself constitute a regulation of commerce of a national character, or which has a uniform operation over the whole country, it is not easy to maintain, in view of the principles on which the cases are decided, that it violates the clause of the Constitution which we have under review."

Does the tax now under discussion "institute a regulation of commerce of a national character," or one which "has a uniform operation over the whole country?" It seems almost idle to discuss such a question. Surely the dealing between the Reading railroad and the Commonwealth of Pennsylvania as to the taxes, on its business of shipping coal from the mines to Port Richmond, in Philadelphia, is not a national regulation. But a distinct argument of the proposition is fortunately rendered unnecessary by the decision in *Crandall vs. State of Nevada*. It was there held that the tax under dispute was not such a one as to come in conflict with the constitutional provision. Now the tax in that case was exactly similar in its operation to the one at present before the court, with the exception that the tax in the Nevada case bore much more directly on the person transported than this one does on the goods carried, and was also a discrimination against a particular class of traffic. The law there provided that "there shall be levied and collected a capitation tax of one dollar upon every person leaving the State by any railroad, stage coach or other vehicle engaged and employed in the business of transporting passengers for hire," and that the owners and corporations of said road or coach shall pay the said tax. For the purpose of collecting it another section required from persons engaged in such business, or their agents, a report every month, under oath, of the number of passengers so transported and the payment of the tax

to the sheriff." The tonnage tax law, now under dispute, provides for the payment of a tax of two cents per ton on every ton carried, whether in or out of the State; and further, the corporations must make a return, under oath, of the number of tons carried every three months, and pay the tax into the hands of the State Treasurer. Unlike the Nevada tax, it is uniform in its operation on all classes and makes no discrimination. It will thus be noticed that the tax in Nevada and the tax in Pennsylvania present a curious resemblance, and differ only in that the former one is much stronger in its bearing against the constitutional provision than the latter. Yet this court held in that case that as the tax was not a uniform rule of the whole country or national in its character, it was not in conflict with the constitutional restriction, Congress having failed to legislate upon the subject. There has been no act of Congress since passed which bears upon the subject. If, then, the tax imposed in 1867 was not unconstitutional, how can the one now before the court be so, when it is a counterpart of the former, so far as its relations to transportation are concerned? Here, then, is a direct decision of this court that such a tax as the one now before it is not a regulation of commerce so far as to be unconstitutional. From the decided cases, the defendants in error contend that the tax now being considered is not a rule to govern intercourse, so as to come within the constitutional provision, supposing the power to make such rules to be exclusively in Congress, but is merely a tax bona fide in its nature, and local in its operation, and such a one as is recognized as within the power of the States, by all the latest decisions of this tribunal.

3. *The law in question is an exercise of the power of taxation reserved to the States under the Constitution, is equal in its operation, bona fide in its character, making no discrimination against non-residents, and is levied on the franchise of every corporation in proportion to its business.*

It is unnecessary to occupy the attention of the court by citing authorities to show that a State can levy a tax on the franchises of its own corporations. This has been so repeatedly decided by this court as to become an axiom. The defendant in error contends that under the undeniable right to tax the franchises of her citizens she has seen fit to levy this tax. The tax is improperly

said to be a tax on a ton, or tonnage tax. In fact the word ton does not occur, except incidentally, in the act of the Legislature imposing the tax. The words of the law are: "And each of the companies shall, at the time of making such return, pay to the State Treasurer, for the use of the Commonwealth, *on each two thousand pounds of freight* so carried, a tax at the following rates, etc." It therefore appears that the tax is payable by the company in proportion to the amount of freight carried. The law might as well have read one cent on each 1,000 lbs. Now the fact that this is a tax on the franchise of the company is apparent, when it is remembered that all of the receipts of the great majority of railroads in Pennsylvania are derived from freight. In the case of the plaintiff in error, their business is almost exclusively a transportation business, and the value of their franchises to themselves can be graded exactly by the amount of freight carried, for almost all their receipts are derived from freight. Can it be successfully contended that the Commonwealth could not have charged a tax on the income of this company at any rate she pleased? Yet the income is derived exclusively from freight. Why then can she not tax the company by amount of freight carried, at so much per 1,000 pounds, as well as at so much on each dollar of income received from carrying that freight. If this company got one dollar from every 2,000 pounds of freight carried, could not the State levy a tax of two cents on every dollar of income, before there should be any dividend? If she could why can she not measure the business of the company by the amount of freight and not by the amount of receipts, and lay a tax on the franchise of the company of two cents on each 2,000 pounds? The 2,000 pounds which go to make up a Pennsylvania ton is merely a convenient standard whereby to measure the amount of business transacted by the company. As is said by the Supreme Court of Pennsylvania, in its decision of this case, reported in 11 P. F. Smith: "It being an undoubted creation of the State, and subject of State sovereignty, it is therefore clearly within the power of State taxation. Hence, it is immaterial how the subject of taxation is measured, by weight or by enumeration. The Pennsylvania ton of 2,000 lbs. is a convenient and equitable means of measuring the subject of the tax, and in ordinary speech is called a tonnage tax, or tax on weight."

The practical effect of the tax in question is to make its amount vary with the amount of the freight of the different transporting companies, and grades the proportion which each shall pay to the State in accordance with the value which the franchises granted to each by the State, have been to the corporation during the period covered by the tax. Not only is this a proper exercise of the power of taxation, but it is in the form which has been especially commended by this court. The question of taxation according to the amount of business done by a corporation came before the court in *Society for Saving vs. Coite*, 6 *Wallace*, 608.

That was a tax levied on the gross deposits of a saving bank, in its hands on a certain day. It was contended that the United States securities held by it could not be thus taxable, as they were exempt from State taxation. The court held such a tax to be on the franchise of the corporation, and sustained it. Justice Clifford said:

"Amount of the tax required to be paid by the defendant corporation is a sum equal to three-fourths of one per cent. on the total amount of deposits in the institution, on the 1st day of July in each year. Reference is evidently made to the total amount of deposits on the day named, not as the subject matter for assessment, but as the basis for computing the tax required to be paid by the corporation defendants. They enjoy important privileges, and it is just that they should contribute to the public burdens.

"Different modes of taxation are adopted in different States, and even in the same States at different periods of their history. Fixed sums are in some instances required to be annually paid into the Treasury of the State, and in others a prescribed per centage is levied on the stock, assets or property owned or held by the corporation, while in others the sum required to be paid is left indefinite, to be ascertained in some mode by the amount of business which the corporation shall transact within a defined period.

"*Experience shows that the latter mode is better calculated to effect justice among the corporations required to contribute to the public burdens than any other which has been devised, as its tendency is to graduate the required contribution to the value of the privileges granted*, and to the extent of their exercise. Existence of the power is beyond doubt, and it rests in the discretion of the

Legislature whether they will levy a fixed sum, or if not, to determine in what manner the amount shall be ascertained."

The business of transportation is as much the business of the railroad companies, as is that of receiving deposits the business of the savings bank. If, then, a tax on the total amount of deposits at a certain day, is a tax on the franchise, why is not a tax on the total amount of freight carried, a like tax on franchise? And the court justly held not only that such a tax was legal, but commended it as the most equitable that could be devised.

The same view of the subject was reiterated in *Provident Institution vs. Massachusetts*, 6 *Wallace*, 623, where the court summed up its conclusions:

"That private corporations and all trades and avocations by which the citizens acquire a livelihood, may be taxed by the State for the support of the State government. That such authority resides in the States independent of the Federal government, and that it is wholly unaffected by the fact that the party, whether corporation or individual, has or has not made investment in Federal securities. That the power rests in the discretion of the Legislature to decide whether the sum to be levied shall be a fixed one, and if not, to determine in what manner and by what means the amount shall be determined."

The case last quoted was a tax on the average deposits of a bank, and the court well held that it was a tax on the corporation graded according to its wealth. Justice Clifford said: "But the assessment of the tax is to be made semi-annually on the average amount of the deposits for the six months preceding the respective days named, and not on the value of the property as supposed. Reference to the average amount of the deposits is made, not as descriptive of the subject to be assessed, but as furnishing the basis of computing the amount of the tax to be paid by the corporation. The subject matter to be taxed is the corporation, and the average amount of the deposits within the period named furnishes the basis for computing the amount. The amount of franchise tax depends upon the business transacted by the corporation, and the extent to which they have exercised the privilege granted in their charter."

These cases, decided so recently and at the same time so clearly stating the law in the present case, require no further citations to

give force to the position assumed by the Commonwealth. But the language of C. J. Bigelow, of Massachusetts, in the *Commonwealth vs. The People's Five Cent Savings Bank*, 5 *Allen*, 433, so clearly set forth that the bank tax cases sustain the tax as one of the franchises, that we venture to quote it here. The case was one of a tax levied on the deposits of the bank at certain dates. The court held that such a tax was on the corporation, and its franchise graded according to the amount of its deposits. *Bigelow, C. J.*— "Having in mind these well settled rules or exposition, it appears to us that the assessment imposed by the provisions of the statute under consideration must be regarded as an excise or duty on the privilege or franchise of the corporation, and not as a direct tax on money in its hand belonging to depositors.

"It is the extent to which the corporation has exercised the franchise conferred on it by law, of receiving deposits during a certain period, that is made the basis on which to estimate the sum which is to be paid for the enjoyment of the privilege. It is difficult to see in what other mode a more just and equitable assessment could be laid on corporations of this peculiar character, under the authority to impose an excise or duty on their franchise.

"The excise is not laid on the business which each bank has transacted in the way of receiving deposits during the six months preceding June, 1862, but upon the value of the franchise at that date; that is, its present capacity to transact business and the amount and extent of its operations estimated by the standard of the average of deposits which it had on hand during the period immediately preceding. This is not a retroactive provision, but only a fair mode of ascertaining the existing value of a subject of taxation."

But the plaintiffs in error contend in their argument that, "Indeed, the case of the Commonwealth would be stronger if it could be shown that the statute was intended to tax the goods themselves, and not the transportation of them; if it had provided that all goods in transit from or through Pennsylvania should be detained at the boundary line until the consignees paid a tax as an equivalent for the protection which the laws of Pennsylvania had afforded them. It might then be urged with some plausibility that the question was simply as to the right of a State to tax

property within its jurisdiction, irrespective of all other considerations."

This proposition is certainly novel. If the position of the plaintiffs be correct, then any transportation company cannot be taxed because it is a transportation company. The State can tax a miner of coal; it can tax a buyer of coal, but it cannot tax the business of a transportation company, although that company transports only by virtue of a franchise granted it by the State; and we must differ from the assertion of the plaintiff, that a tax levied on the business of transportation is more illegal than one would be which detained goods on the boundaries of the State until a transit tax was paid. An assertion of such a proposition seems to carry with it a refutation.

But a still more powerful argument in favor of the State is found in the fact that it is a *bona fide* tax, levied by her, not for the purpose of charging on any branches of business undue burdens, but to raise revenue in an equitable manner from the corporations which owe their existence to her dominion. The tax is levied upon every ton of goods carried, whether they be shipped by a citizen of Pennsylvania, of New Jersey, or any other State. The burdens fall equally heavily on all classes of business, and fail to charge upon the foreign citizens a penny more than is charged upon our own. It may be that if a tax is illegal as levied against a citizen of another State, it cannot be made legal by levying it against a citizen of Pennsylvania. But the fallacy of the argument is found in confounding the cause and effect. It is not because it is a tax law that the act can be complained of. It is because it amounts to a regulatian of commerce; and when we show that it does not amount to a regulation of commerce, but is a *bona fide* tax law, we show that it is constitutional. It is fallacious to start with the premise that it is illegal as to certain parties. The fact that there is no discrimination is evidence of good faith on the part of the State. It removes it from any suspicion of unfairness, and makes the plaintiff come here, not as injured parties seeking protection, but as a corporation seeking to escape from paying her share of a tax which must be borne by all its fellow-corporations. The effect of the tax, so far as traffic is concerned, is well stated by Judge Agnew in his opinion, which is appended to this brief. He says:

"And it is evident it does not matter whence or whither these tons travel, so that there be no discrimination, to forbid or to burden their entrance into or exit from the State, and being a tax on the benefit and the privilege on transportation on works constructed for this end, it bears equally on all. Nor can it make any difference, as we have already seen, that the company is allowed to add this tax on its franchises to the tolls or charges on the freight itself. It is the owner of the freight who enjoys both the privilege and the facility this valuable franchise affords, and whose toll could be increased by the State to the same extent if the works were in her hands. It falls upon those who use the road, not because it is a regulation of commerce, but because it is a subject of internal regulation, to which he is bound to contribute. There is in fact and authority, a substantial distinction between an act which simply operates as a burden on commerce and one which attempts to regulate it. No one can doubt the power of a State to tax her own coal, iron, lumber, grain and other products of her mines and soil, and the persons and occupations of those engaged in their production or their transportation, and yet these burdens eventually fall on those who consume them, whether they live in or out of the State. Yet clearly such taxation is no regulation of commerce. The State is laying a common tax on all such articles is not bound and cannot be presumed to know where they will be consumed, nor to inquire their destination of those who traffic in or transport them. If she do not discriminate between that which goes out or comes in and that which remains within, it cannot be said that she in any sense attempts to regulate commerce with other States, or to impose a duty on imports or exports. In principle, where there is no discrimination, there is no difference between a tax on a transporter, whether in gross or measured by the ton he carries, and a tax on a farmer, the manufacturer, the miner, the merchant or the broker, measured by the business he does. Yet all the impositions are burthens which reach the consumer wherever he lives. The fallacy of the argument which insists that the burdens of internal transportation shall not be shared by the distant consumer, on the ground that it is an import or export duty, or a regulation of commerce, is seen the fact that to exempt articles going out of the State, would be to discriminate in favor of the foreign and against the domestic consumer. Coal carried

from the mines to Richmond, on the Delaware, and there disposed of, is conceded to be liable to the tax, but if intended to be sent forward to places without the State, it is said not to be liable; what is this but to impose a tax on our own citizens, which those beyond the State are not to bear? Pennsylvanians are citizens of the same Union, and entitled to its equal protection against such discrimination."

The absurdity of such a proposition is apparent. A resident of Camden, opposite Philadelphia, can have coal shipped to him from the mines and cannot be taxed. A resident of Philadelphia must pay the tax. Hence it would follow that if the construction contended for by the plaintiffs be correct, the citizens of Philadelphia, whose State has chartered the Reading railroad, whose capital is to a large extent involved in it, whose authorities protect its mines, &c., its property and grant it franchise, could be under-bid in their own market by a citizen of New Jersey, merely because he was a citizen of that State, which has nothing whatever to do with the continuance, existence or safety of either the corporation or its property. Pennsylvania coal, from Pennsylvania mines, transported by a Pennsylvania company, could be bought in Camden cheaper than in Pennsylvania. It seems idle to re-argue the point that the Constitution never intended such a discrimination by a State against its own citizens.

In Paddleford vs. Savannah, 14 *Geo.*, 438, the court said: "It is not said in *Brown vs. Maryland*, that the State must discriminate *in favor* of the foreigner and not tax him when she taxes her own citizens. Now, what was the object of the prohibition? In a word, was its object to put foreigners in a better condition than natives? We know that the object was not to put citizens of another State in that better condition."

Fortunately, however, this point has already had the attention of this court. In the case of *Woodruff vs. Parham*, 8 *Wallace*, 123, decided December, 1868, this point received the attention of the court. It was a tax levied on the gross sales at auction of auctioneers in Mobile, Georgia. It was proved that a large amount of the sales were of packages, unbroken, which came from Alabama. It was contended that a tax could not be levied by Georgia on these consignments. The court upheld the tax and clearly showed that it was never intended by the Constitution to

discriminate against a citizen of a State and in favor of citizens of other States. Miller, J. on pages 137 and 893, in illustration of the absurdity of such an idea, says:

"The merchant of Chicago who buys his goods in New York and sells at wholesale in the original packages, may have his millions employed in trade for half a life-time and escape all State, county and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the State nor the city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares, or educate its children. The merchant in a town in Massachusetts, who deals only in wholesale, if he purchase his goods in New York, is exempt from taxation. If his neighbor purchase in Boston, he must pay all the taxes which Massachusetts levies with equal justice on the property of all its citizens."

"These cases are merely mentioned as illustrations. But it is obvious that if articles brought from one State into another are exempt from taxation, even under the limited circumstances laid down in the case of Brown vs. Maryland, the grossest injustice must prevail, and equality of public burdens in all our large cities is impossible.

"The case of Brown vs. Maryland, as we have already said, arose out of a statute of that State, taxing *by way of discrimination*, importers who sold, by wholesale, foreign goods.

"If the court, then, meant to say that a tax levied on goods from a sister State, which was not levied on goods of a similar character produced within the State, would be in conflict with the clause of the Constitution giving Congress the right "to regulate commerce among the States," as much as the tax on foreign goods, then under consideration, was in conflict with the authority "to regulate commerce with foreign nations," we agree to the proposition.

"But, we may be asked, is there no limit to the power of the States to tax the product of their sister States brought within their borders? And can they so tax them as to drive them out or altogether prevent their introduction *or their transit over their territory?*

"The case before us is a simple tax on sales of merchandise, im-

posed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another State, and whether the goods sold are the produce of that State or some other. There is no attempt to discriminate injuriously against the products of other States or the rights of their citizens; and the case is not, therefore, to fetter commerce among the States or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects, and therefore void. There is, also, in addition to these restraints, which those provisions impose by their own force on the States, the unquestioned power of Congress, under the authority to regulate commerce among the States, to interpose, by the exercise of this power, in such a manner as to prevent the States from any oppressive interference with the free interchange of commodities by the citizens of one State with those of another."

We rest on the words of the learned justice quoted. Our case is parallel with the one then decided, and if the tax is illegal then none of the burdens which have to be borne by Pennsylvania are to be shared by those who have the protection and use of our laws.

But the view of the court on the subject of discrimination is yet more decidedly stated in *Hinson vs. Lott*, 8 *Wallace*, 150. In that case Georgia levied a tax of fifty cents on each gallon of whisky brought into the State from a sister State for sale and sold in the original cask. She, also, by the same act, levied a like tax of fifty cents on every gallon of whisky manufactured and sold in the State. The first she collected as a tax, the latter as a license. When the section imposing the tax on imported liquors came before the court, Miller, J., said:

"If this section stood alone in the legislation of Alabama on the subject of taxing liquors, the effect of it would be that all such liquors brought into the State from other States and offered for sale, whether in the original casks by which they came into the State, or by retail in smaller quantities, would be subject to a heavy tax, while the same class of liquors manufactured in the State would escape the tax. It is obvious that the right to impose any such discriminating tax, if it exist at all, cannot be limited

in amount, and that a tax under the same authority can as readily be laid which would amount to an absolute prohibition to sell liquors introduced from without, while the privilege would remain unobstructed in regard to articles made in the State. If this can be done in reference to liquors, it can be done with reference to all the products of a sister State, and in this mode one State can establish a complete system of non-intercourse in her commercial relations with all the other States of the Union.

"We have decided, in the case of Woodruff *vs.* Parham, immediately preceding, that the constitutional provision against taxing imports by the States does not extend to articles brought from a sister State. But if this were otherwise, and we could hold that as to such articles the rule laid down in Brown *vs.* Maryland, concerning foreign imports, applied, it would prevent but a very little evil which we have described; for, under the decision in that case, it is only while the goods so imported were held in the original unbroken condition in which they came into the State, and in the hands of the first importer, that they would be protected from State taxation. As soon as they passed out of his hands into use, or were offered for sale among the community at large, they would be liable to a tax which might render their use or sale impossible.

"But while the case has been argued here with a principal reference to the supposed prohibition against taxing imports, it is to be seen from the opinion of the Supreme Court of Alabama, delivered in this case, that the clause of the Constitution which gives to Congress the right to regulate commerce among the States, was supposed to present a serious objection to the validity of the Alabama statute. Nor can it be doubted that a tax which so seriously affects the interchange of commodities between the States as to essentially impede or seriously interfere with it, is a regulation of commerce. And it is also true, as conceded in that opinion, that Congress has the same right to regulate commerce among the States that it has to regulate commerce with foreign nations, and that whenever it exercises that power all conflicting State laws must give way, and that if Congress had made any regulation covering she matter in question we need inquire no further.

"That court seems to have relieved itself of the objection by holding that the tax imposed by the State of Alabama was an exer-

cise of the concurrent right of regulating commerce remaining with the States until some regulation on the subject had been made by Congress. But, assuming the tax to be, as we have supposed, a discriminating tax, levied exclusively upon the products of sister States; and looking to the consequences which the exercise of this power may produce if it be once conceded, amounting, as we have seen, to a total abolition of all commercial intercourse between the States, under the cloak of the taxing power, we are not prepared to admit that a State can exercise such a power, though Congress may have failed to act on the subject in any manner whatever.

"The tax in the case before us, if it were of the character we have suggested, discriminating adversely to the products of all the other States in favor of those of Alabama, and involving a principal which might lead to actual commercial non-intercourse, would, in our opinion, belong to that class of legislation and be forbidden by the clause of the Constitution just mentioned.

"But a careful examination of that statute shows that it is not obnoxious to this objection. And it is clear that, whereas collecting the tax of the distiller was supposed to be the most expedient mode of securing its payment as to liquor manufactured within the State, the tax on those who sold liquor brought in from other States was only the complementary provision necessary to make the tax equal on all liquors sold in the State. As the effect of the act is such as we have described, and it institutes no legislation which discriminates against the products of sister States, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the State, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the State."

So, also, in the present case. As the tax does not discriminate against citizens of other States, but merely charges all alike, it is not an attempt to regulate commerce, but is an exercise of the taxing power of the State.

And it is a fact worthy of note, that all the research of the learned counsel for the plaintiff in error has failed to discover a single case in which this court has overturned a State tax law, which is *bona fide* in its provisions, which contains no covert at-

tempt to regulate commerce, but enacts, without discrimination, a tax alike for residents or non-residents, in proportion to the business carried on under the protection of the State which imposes the tax.

A. If the proposition of the plaintiff be correct, and the goods shipped to points outside the State be free from taxation, because the tax then would be to regulate commerce, why cannot the citizens of Pennsylvania object to paying any tax on their goods, on the ground that by freeing the non-resident and charging the resident, there is an unjust discrimination against the resident. All are citizens of one common Union, all are entitled to the same position by the Constitution of the United States. Why, then, should the Pennsylvanian be charged two cents when the citizen of New Jersey is exempt? Does not the State, by such a discrimination, regulate commerce, by putting the resident at a disadvantage, and has he not a like right to claim protection? Such a defence to taxation, if good, would bankrupt the Commonwealth, by depriving her of all her revenue.

4. *This is a tax imposed by the State as compensation for the use of artificial works created by her authority, and in exercise of her right of eminent domain.*

It cannot be denied that the Commonwealth of Pennsylvania, had she seen fit, could have refused to allow the Reading railroad to be built. It owes its existence entirely to her pleasure. No consideration of inter-State traffic could have availed anything so far as to compel her to authorize its erection. It might have been true, as it was, that the necessities of foreign commerce required the completion of such a road, but no such consideration would have received the attention of the court. And she may still destroy the Reading railroad, and forfeit its franchises, unless restrained to the rights of the corporation. There is nothing in the shape of an authority vested in the United States courts which could for a moment restrain her from, to-morrow, tearing up every rail between Reading and Philadelphia. If, then, the power to regulate commerce vested in Congress, is not such a power as to compel the building of the road or to prevent its destruction when the State sees fit, how then can it be that the power to regulate commerce is such as to prevent the State charging the parties using the road. If she can refuse to create, if she can destroy, why can

she not tax for the existence? A distinction between a tax and a regulation of commerce has been frequently recognized by this court.

Passenger cases, 7 *How.*, *p.* 402, *M'Lean*, J.—"A State cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce, the same as other property owned by its citizens. A State may tax the stages on which the mail is transported, but this does not regulate the conveyance of the mail any more than taxing a ship regulates commerce. And yet in both instances the tax on property in some degree effects its use."

Passenger cases, 7 *Howard*, 479, *Taney*, *C. J.*, "distinguishes between the right to regulate commerce and the right to tax it as being entirely distinct."—Cites Gibbons *vs.* Ogden.

Passenger cases, *M'Lean*, *J.*, *p.* 403.—"Inquiry is made, whether Congress, under the power to regulate commerce among the several States, can impose a tax for the use of canals, railroads, turnpike roads and bridges, constructed by a State or its citizens? I answer, that Congress has no such power."

[Then such a tax would not be a regulation of commerce?]

"The United States cannot use any one of these works without paying the customary toll."

"The tolls are imposed, not as a tax in the ordinary sense of that term, but as a compensation for the increased facility afforded by the improvement."

[If it be a tax on commerce, is it any the less legal?]

"If the money demanded is a tax on commerce or the instrumental vehicle of commerce, it furnishes no objection to it unless it is a duty on imports, or a tonnage duty, for these alone are forbidden."

[It is not a tax on imports, as it is not on the goods, they are neither detained nor made liable, nor are their owners liable for the tax, and it cannot be demanded of them by the company in advance, as may be inferred from the act *allowing* certain companies so to do.—Act of August 25, 1864.]

Veazie vs. Moor, 14 *How.*, 568.—The river Penobscot is wholly in Maine. Eight miles of it are unnavigable, and above that imperfectly so. A State law, giving a certain improvement company exclusive right to navigate the upper part, is not unconsti-

tutional, and a United States coasting license does not entitle a holder to navigate those waters.

Daniel, J., p. 574.—Nor can it properly be concluded that, because the products of domestic enterprise, in agriculture or manufactures, or on the arts, may ultimately become the subjects of foreign commerce, that the control of the *means*, or the encouragements by which enterprise is fostered and protected, is legitimately within the import of the phrase, foreign commerce, or fairly implied in the investiture of power to regulate such commerce. A pretension so far reaching as this would extend to, and control the immense operations of the collieries and mines and furnaces of the country; for there is not one of those associations, the results of which may not become the subject of foreign commerce, and be borne, either by tin pipes, canals, or railroads, from point to point, within the several States, to an ultimate destination, like the one above mentioned. *Such a pretension* would effectually prevent or paralyze every effort at internal improvement by the several States, for it cannot be supposed that the States would *exhaust their capital and their credit* in the construction of *turnpikes, canals and railroads, the remuneration derivable from which*, and all control over which, might be immediately arrested from them, *because such public works would be facilities for a commerce, which, whilst availing itself of these facilities, was, unquestionably, internal, although intermediately or ultimately, it might become foreign.*

The rule here given, with respect to the regulating of foreign commerce, equally excludes from the regulation of commerce between the States, the control over turnpikes, canals, or railroad, or the management of the transportation upon and by means of such improvement.

12 *Conn., p. 7, Kelley vs. Union Company.*—The power of a State to improve the navigation of a navigable river, within its limits, between a port of entry and a port of delivery, established by Congress, on that river, and to provide for the expense of such improvement, by a grant of tolls on a description of vessels passing up and down the river, which, without such improvement, could not ordinarily pass, does not conflict with the power of Congress to regulate commerce, and the grant of tolls is valid.

Bissell, J., 20.—"It is conceded that Congress has exclusive

power to regulate commerce with foreign nations and between the States. It is, also, conceded that this clause in the Constitution does not, of itself, divest the States of their jurisdiction over the navigable waters of the State, within their territorial limits, but that their control remains the same as before the adoption of the Constitution, until Congress does, in fact, legislate regarding them. It is further conceded, that Congress has legislated in regard to the navigation of the Connecticut river, by making Middletown a port of entry, and Hartford a port of discharge."

P. 21.—"Again, Congress has power, under the Constitution, to establish post roads and offices, and, perhaps, no power has been more frequently or more extensively exercised, and hardly less extensive has been the legislation of the States incorporating turnpikes and ferries, and empowering them to exact tolls, not only upon merchandize but upon the vehicles transporting the United States mails. The power of the States to do this has never been doubted."

"Nor has it ever been questioned that a State has power to construct a canal within its territory, and to impose a toll on merchandize transported upon it."

Though Congress has legislated on the subject, thereby establishing a port of entry and one of discharge, we think "that the State may, notwithstanding, enact laws for the improvement of navigable rivers within its own limits. For although such enactments may incidentally affect commerce; yet they are not a regulation of commerce, nor are they adopted by the States in virtue of any supposed power to regulate commerce."

Thames Bank vs. Lovell, 18 *Conn.*, 500.—"A State law, imposing reasonable tolls on vessel or freight as compensation for improving the navigation of a river within its own borders, is constitutional and valid, unless it conflicts with the powers of Congress in actual use."

The question of the right of a State to charge a tax as a compensation to the erection of an artificial highway, received the attention of the Supreme Court of Pennsylvania, in the case of *The Pennsylvania Railroad vs. Commonwealth*, 3 *Grant's Cases*, 129. The charter of incorporation in that case provided for a tax, payable by the company, of three mills per ton per mile for every ton

carried. *Lowrie, C. J.*, in delivering the opinion of the court, said:

"Though the charter does say that all tonnage carried on this railroad shall be subject to a toll or duty of three mills per ton, per mile, yet it is quite apparent that this is not intended as a means of taxing commerce, or the goods carried, but simply a mode of taxing the company, according to the magnitude of its business. We say this is apparent, because the State is not to look to the goods carried, nor the owners for the tax, but only to a company, so as to measure a portion of its taxes by the amount of a particular portion of its business."

[The tax here is exactly the same, the only difference being that one is imposed in the act of incorporation and the other in a general act.]

"The charter is intended to regulate the relations of the company with the State, and not those of other persons."

[It is the same in this case.]

"Now they seek to evade this *law or contract* by saying that it is unconstitutional and void. Is it so? If the question is to be answered in the affirmative, it must be done on some original principle that has as yet received no practical application, for no case has been cited, and we know of none in which such a rule of law or any closely analogous one has been announced."

"It is argued that the authority to impose such a tax is excluded by some one or more of three rules of the Constitution, giving to Congress the exclusive power to regulate commerce with foreign nations and among the States, (art. 1, sec. 8–3,) and prohibiting the States, without the consent of Congress, from laying duties on imports or exports, (art. 1, sec. 10–2,) or any duty on tonnage," (art. 1, sec. 10–2.)

"How can the exclusive power of Congress to regulate commerce be understood as forbidding this tax?"

"No such latitudinarianism of interpretation has ever yet been applied to this clause. Making roads is a mode of regulating commerce, by giving it facilities and direction, but no one has ever taught that this clause excludes the States from making their own roads and their own laws to govern the use of them, or from imposing road taxes in their own form for travel upon them; even

a tax that may afford an increase beyond the expense of construction and repairs."

Page 130.—"Surely a State may improve its own domains and thoroughfares as it chooses, and impose its own terms in the common use of these."

"There is no distinction made in this charter, between goods of our own citizens and those of others."

"What we have before said, shows that no duty is imposed on goods at all, and of course none on imports or exports. It is so plainly not a duty of this sort, that we must acknowledge that we have not skill enough to frame an argument that can make it plainer."

"Now, is it a duty on tonnage? This means simply that sort of duty, that at the date of the Constitution was called tonnage, and that was a duty on ships or their cargoes, imported or exported, measured by their capacity or weight."

"The word is used here in a derivative sense."

Considered either as a contract or a law, it was upheld by the court.

And if the tax imposed by the act of August 25, 1864, is unconstitutional, not because of its effect upon these defendants, but on account of its being, as alleged, a regulation of commerce between the States, and, in substance, a tax thereon, how can it be held that a contract entered into between the Legislature and the company stands upon any better or different footing? For whether it is called a tax law or a contract between the company and the State, it is the same thing in reality, and if unconstitutional in one case is equally so in the other. Such a contract would be against public policy. The State and the company cannot, by contract, commit a breach of the Constitution. If this tax is valid as a contract between the company and the State, without regard to the public at large, so too would it be valid as a *law*, provided it did not conflict with the terms of the grant from the State to the company.

But all that the defendant could urge as to this view of the case is so fully and ably stated in the opinion of Judge Agnew, in the decision of the case in the Supreme Court of Pennsylvania, that we cannot do better than incorporate its words into this brief and adopt them as our own. He says:

"Among the most important reserved State rights, and one directly connected with the question before us, is that of eminent domain. This undoubted power has been exercised in the improvement of navigable streams, and in building and establishing ferries over them, and in the construction of roads, turnpikes, canals and railroads; and has been repeatedly recognized in authoritative decisions. RIVERS—*See Wilson vs. Blackbird Creek Co.*, 2 *Peters*, 245; *Martin vs. Waddell*, 16 *Peters*, 367; *Kelly vs. Union*, 12 *Conn.*, 7; *Thames Bank vs. Lovell*, 18 *Conn.*, 500; *Veagie vs. Moore*, 14 *Howard*, 568. BRIDGES—*Pennsylvania vs. Wheeling Bridge Co.*, 18 *Howard*, 430; *Gelman vs. Philadelphia*, 3 *Wallace*, 713; *The Passaic Bridge*, 3 *Wallace*, 782; *Flanigan vs. Philadelphia*, 6 *Wright*, 231. FERRIES—*Conway vs. Taylor*, 1 *Black*, 603; *Freeholders vs. New Jersey*, 4 *Zabriska*, 718. Under this invaluable power the States have built up a net work of railways and canals, and have improved natural channels through which the commerce of the whole Union is coursing, like the life-blood throughout the natural system. This was not done under any supposed authority to regulate inter-State commerce, or to aid in the execution of the federal power over commerce between the States; but was done under the unquestioned power of the State to improve her own resources, and to regulate her internal affairs. Yet, does any one doubt the grand and beneficial impulse given to inter-State commerce by this exercise of State power? And who can doubt that the State has a right to compensation for the expenditure of her means and the benefit she has conferred on all who use her works? They were built by herself or under her franchises, and the right to exact tolls, charges and fares for their use, is a necessary consequence of her power to construct them. Nor does it make any difference what form her compensation takes—whether that of a direct charge on the tonnage using the road, or that of a tax on the corporations who use her franchises—her right is to exact the compensation from those who use her works. To gainsay this is to deny her right of eminent domain, and her power to legislate upon her internal affairs and the creations of her own sovereignty. If these works were, as once some of them were, in her own hands, what provision in the Federal Constitution would forbid her to increase her revenue by an increase of the charge of transportation over them? When in the

hands of creatures exercising her franchises, what clause in any instrument forbids her to tax the franchises, and authorize the tax to be added to the pre-existing tolls and charges? To legislate once, is not to exhaust her power over the subject of tolls or charges, but to legislate at all is to assert her power. Whether it be called a toll or tax, what is this but to increase a charge which she can rightfully demand? The right to demand any toll or charge upon all articles transported, or fares for passage, is derived from her grant, and the power to determine their extent depends upon her discretion. It is a right of which she cannot be deprived, and of which she is the only judge, unless, perhaps, the power should be so unreasonable and oppressively exercised, as to afford evidence of a design, by a fraudulent use of the power to interdict or ruinously affect the commerce of other States. To say, because her citizens engage in mining for an extra territorial market, or because merchandise may pass over these works out of or into the State; that to exact tolls and charges for the minerals or merchandise transported over them, or to tax the franchises of those engaged in the work, is a regulation of commerce, is to confound all just distinctions and to destroy the most sacred right of a State. Her power to levy revenue from transportation over these works may be seen in her power over the works themselves. If compensation were denied her by way of revenue, who can dispute her power to suffer her own works to fall into decay and ruin; or, when unfettered by a charter contract, to repeal the charters under which they were built. Inter-State commerce might suffer, but what power could control the act? Then, on what principle is it she cannot levy a tax on these instrumentalities, for the privileges granted, because the products carried are destined for points without, or from without to points within the State? It is carriage or destination, which gives the right of toll, tax or charge. It is not levied on them because the products go out or come in, but because they have the privilege and the benefit of transportation.

"The case is not rested on the debatable ground of State power to regulate inter-State commerce in the absence of Congressional legislation on the same subject, but on the admitted right of a State to execute its power of eminent domain in the construction of works for the transportation of freight and passengers, and to

legislate and tax their use by those who choose to employ them as undoubted subjects of her domestic affairs, and of that internal commerce which she can rightfully control so long as she does not fraudulently exercise her power, to the injury of the citizens of other States."

To this argument the plaintiffs reply, "that the rivers of Pennsylvania are not constructed by the State power of eminent domain," and that a tax is impoeed on every ton transported within the territorial limits of Pennsylvania by every steamboat, and cite from the opinion of Judge Pearson, of the common pleas of Dauphin county, in an unreported case, which quotation we give entire:

"The law applies alike to all means of transportation, whether on the navigable rivers passing through the State, the great lakes of the west, or any line of canal or railroad. If goods are started from Olean, in the State of New York, to be carried on the steamboats or other boats of a transportation company, to New Orleans, they may be taxed by the ton so soon as the boat, with its freight, crosses the line of Pennsylvania, and thus our great rivers be no longer free to the commerce of all the citizens of every State through which it passes. A steamboat company incorporated in Buffalo or Chicago, by the laws of the respective States, is engaged in transporting freight from one port to the other, and is so unfortunate as to require coal or other fuel when near Erie, goes into that port and is taxed by the ton for all the freight on board. The same consequences would follow should the boat stop at that place to receive or land freight. A like tax could be imposed by Ohio and Michigan, and thus the free commerce of the lakes, hitherto enjoyed by all the citizens, be broken up."

To this we reply, that all of the rivers in Pennsylvania (with the possible exception of a small tract of the Allegheny) are, for the purpose of transportation, artificial highways. The Schuylkill, Susquehanna and Lehigh are all of them navigable only by reason of artificial works created at great expense, and that the evident intention of the act as well as its practical workings, all show that it is only on companies owning artificial works that the charge is to be made. The words of the act are too clear on the subject for argument. They read, that the "officers of every rail-

road company, steamboat company, canal company and slack-water navigation company, and all other companies now or hereafter doing business in this State, *and upon whose* WORKS *freight* may be transported, whether by such company or by individuals, and whether such company shall receive compensation of transportation, for transportation and toll, or shall receive toll only, shall be," etc. It will thus be seen that it is only on companies having *works* that the tax is charged. This would not include a company plying with boats upon the Delaware river, unless, perhaps, it be a Pennsylvania company owning works, viz: steamboats, under the authority of the Commonwealth. And in point of fact the accounting departments of the State have never attempted, under the act, to give it any such interpretation. This also disposes of the statement of Judge Pearson. A steamboat company incorporated in Buffalo and sailing on Lake Erie, could stop as often as it pleased at Erie for coal without being taxed. It could not be taxed by Pennsylvania under this act, even if she desired to do. And it is respectfully submitted to the court, that such a statement of facts nowhere appears in the trial of the cause, is not warranted by the verdict of the jury or the law of the State, and is erroneous.

B. IS THE TAX IN QUESTION AN IMPOST OR DUTY ON IMPORTS OR EXPORTS?

The proposition that it was such, was earnestly contended for in the court below, by the plaintiffs in error, but the decision of the court in *Woodruff vs. Parkham*, 8 *Wallace*, and *Hensen vs. Lott*, *ibid.*, 148, has removed all doubt upon the question, and it is now conceded that it is not unconstitutional on any such ground.

C. IS THE TAX IN QUESTION A DUTY ON TONNAGE?

The definition of the term tonnage, as used in the Constitution, and expounded by this court, compels a decision that the tax in question in no way conflicts with the prohibition to lay such a duty.

To sum up: The defendant contends, that to interfere in any way with the Constitution of the United States, the tax imposed by the act of 1863, must be either a regulation of commerce, an impost or duty on imports or exports, or a duty on tonnage.

First. If it is a regulation of commerce, it is not such a regulation as is vested conclusively in Congress by the clause of the

Constitution, it being local in its operation, and not being a national rule.

Second. It is not a regulation of commerce within the clause referred to, supposing the power to regulate commerce to be exclusively vested in Congress.

Third. It is merely a tax law, just and equitable in its operation, without any discrimination against non-residents, and is a *bona fide* exercise of the taxing power of the State.

Fourth. As a tax, it is imposed by Pennsylvania, for the use of artificial highways, constructed under her authority in the exercise of her right of eminent domain.

Fifth. It is conceded it is not an impost duty on imports or exports.

Sixth. It is conceded that it is not a duty on tonnage.

Hence it is the exercise of the reserved power of the State, and in no way in conflict with the Constitution of the United States.

In order to lay concisely before this court the line of decisions adopted by the various courts before which the issues in this case have come for adjudication, we give a brief statement of each as are reported, arranged in the order of their decision.

1819. *Sturgis vs. Crowinshield*, 4 Wheaton, 122—Marshall, C. J., unanimous.—Since the adoption of the Constitution of the United States a State has authority to pass a bankrupt law, providing there be no act of Congress in force providing for a uniform system of bankruptcy which conflicts with such law.

1824. *Gibbons vs. Ogden*, 9 *Wheaton*, 1—C. J. Marshall, unanimous—This case turned on the constitutionality of a law of New York giving to Fulton & Livingston exclusive power to navigate the waters of New York rivers. Held unconstitutional, because it interfered with the navigation of coasting vessels, which navigation had been authorized by Congress. That navigation was part of commerce, and that Congress having exercised its right to regulate commerce so far as navigation was affected, and this act being in conflict with those of Congress, must fall. Concurring opinion of J. Johnson—does not consider navigation a part of commerce, and therefore to be regulated. Does not base his opinion on the coasting laws. Without such laws the act would be illegal, because the right of carry, trade and propagating seamen is essentially national, and cannot be exercised by a State.

1825. *Biddle vs. The Commonwealth of Pennsylvania*—13 Sergeant and Rawle, 409.—Tilghman, C. J., unanimous.—"The acts of Assembly imposing a duty on the retailers of merchandise, without making any discrimination against importers of foreign merchandise, are not repugnant to the Constitution of the United States. It is unnecessary to consider whether Congress, by virtue of their power to regulate commerce, might authorize citizens of one State to travel through another and sell their goods without license, because they have never legislated on that subject."

1829. *Wilson vs. The Black Bird Creek Marsh Company*, 2 *Peters*, 245—C. J. Marshall, unanimous.—The State of Delaware authorized the creation of a bridge over a small navigable stream, into which the tide ebbed and flowed from the river Delaware. Held, that although it interfered with the navigation of the stream, still it was within the powers reserved to the States, provided it does not come in contact with some action of the general government on the subject, and was constitutional. "If Congress had passed any act in execution of the power to regulate commerce, the object of which was to control State legislation over these small navigable creeks, we should not feel much difficulty in saying that a State law coming in contact with such act would be void. But Congress has passed no such act."

1837. *City of New York vs. Wilson*, 11 *Peters*, 104—J. Barbour, Story, J., dissenting—This was an action brought by the city of New York to recover $15,000 for penalties from the master of a foreign vessel arriving in that port, for failure to report to the mayor of New York the age, etc., of every passenger. It was held that the act was not unconstitutional, as the penalty levied was for the execution of a police regulation. The question of the power of States to regulate commerce, in the absence of national enactment, is expressly included.

1837. *Kellogg vs. The Union Company*, 12 *Connecticut Rep.*, 8—Bissell, J., unanimous.—"The power of a State to improve the navigation of a navigable river within its limits, between a port of entry and delivery, established by a law of Congress, and to provide for the expense of such improvement by tolls on a description of vessels thus enabled to pass up and down the river, does not conflict with the power of Congress to regulate commerce, and is not void or unconstitutional."

1841. *Groves vs. Slaughter*, 15 *Peters*, 449. Thompson, J.—This was a case involving the constitutionality of an act of the State of Mississippi, declaring that after a certain date no slaves should be imported into Mississippi. The court held the act constitutional. Taney, C. J., said: "No case has yet arisen which made it necessary, in the judgment of the court, to decide the question, (whether the power of Congress to regulate commerce is exclusive.) It is treated as an open one in the case of the City of New York *vs.* Milne, 11 Peters, 102, decided in January term, 1837, as will appear by the opinions then delivered, and since that time the point has never in any form come before this court. Nor am I aware that there is any reason for supposing that such a case is likely to come. For the States have very little temptation to make a regulation of commerce when they know it may be immediately annulled by an act of Congress, even if it does not at the time come in conflict with any law of the general government." Six judges assented to the opinion of Judge Thompson and two dissented.

1847. License Cases, 5 Howard, 504, (all the judges delivered opinions.) Unanimous. Laws of Massachusetts, Rhode Island and New Hampshire, providing that no person shall presume to sell at retail wine in less quantity than twenty-eight gallons, unless he is first licensed as a retailer of wines, and that nothing shall be so construed as to require the county commissioners to grant licenses, unless they think it for the public good, adjudged not to be inconsistent with any provisions of the Constitution of the United States or acts of Congress under it.

1847. *The Thames Bank vs. Sevell*, 18 *Connecticut*, 500, *Church C. J.* An act of a State Legislature, imposing reasonable tolls on corporations for improving the navigation of the river Thames, within its borders, is constitutional and valid, unless it conflicts with the powers of Congress in actual exercise, and is not an attempt on the part of the Legislature to regulate commerce.

1849. *The Passenger Cases*, 7 Howard, 283. (All the Judges delivered opinions.) Statutes of New York and Massachusetts, imposing taxes upon alien passengers arriving in the ports of those States, declared to be contrary to the Constitution of the United States, and therefore void. The failure of the court to declare an opinion as a court, caused each of the opinions of the

judges to be delivered, and makes it impossible to say what was the exact point decided. As to the judgment, M'Lean, Wayne, Catron, M'Kinley and Grier, J. J., concurred. Taney C. J., Daniel, Woodbury and Nelson, J. J., dissented.

1850. *Nathan vs. Louisiana*, 8 *Howard*, 72, M'Lean J., unanimous. A tax imposed by a State upon all money or exchange brokers, is not valid nor repugnant to the constitutional power to regulate commerce. Foreign bills of exchange are instruments of commerce, it is true, but so also are the products of agriculture or manufactures, over which the taxing power of a State extends, until they are separated from the general mass of property by becoming exports. A State has a right to tax its own citizens for the prosecution on any particular business or profession within the State.

1851. *Achison vs. Huddleson*, 12 *Howard*, 293—Curtis, J., unanimous. Under an act of Maryland, and assented to by Congress, no toll could be levied for passing over the Cumberland road in coaches which carried the United States mail. In 1843 an act was passed by Maryland imposing a toll on all passengers in mail coaches, and if not paid a toll of one dollar for each coach passing over the road. Held to be inconsistent with the compact of the United States and void.

1851. *Cooley vs. Board of Wardens*, 12 *Howard*, 299.—Curtis, J., [M'Lean and Wayne, J. J., dissented, and Daniel, J., dissents from reasoning.]—A law of Pennsylvania that a vessel which neglects or refuses to take a pilot shall forfeit and pay to the use of the society for the relief of disabled pilots, one half the regular amount of pilotage, is an appropriate part of the general system of regulating pilots, and cannot be considered as a covert attempt to legislate upon another subject under the appearance of legislating on this one. It is not inconsistent with the Constitution of the United States. It is true that the power to regulate commerce includes navigation, and that pilot laws are part of navigation. But the mere grant of commercial power to Congress does not prohibit the States from passing laws to regulate pilotage. The power to regulate commerce includes various subjects, upon some of which there should be a uniform rule, and upon others different rules for different localities. The power is exclusive in Congress in one case, but not so in the other.

1852. *Vezie vs. Moor*—14 *Howard*, 568, Daniel, Justice, unanimous. The river Penobscot is entirely within the State of Maine, from its source to its mouth. In the last eight miles of its course it is not navigable, but crossed by four dams erected for manufacturing purposes. Higher up the stream there was an imperfect navigation. A law of the State granting the exclusive navigation of the upper river to a company who were to improve it, is not in conflict with the eighth section of the first article of the Constitution of the United States, and a license to carry on the coasting trade did not entitle a vessel to navigate the upper waters of the river.

1853. *Freeholders vs. The State*, 4 *Zabriskey*, 718, Elmer, J. Unanimous in court of error and appeals. The regulation of tolls on bridges and turnpikes, and fares on ferries and railroads, part of which is within the State and part in another State, and which are used for communication and commerce between the States, is part of the power reserved to the States and is not delegated to the general government.

1854. *Hays vs. Steamship Company*, 17 *Howard*, 596. Howard, J. (Daniel, J., dissented.) A company incorporated in New York, where all its stockholders resided, owned vessels employed in transporting passengers between New York and California, the vessels remained in California no longer than was necessary then to land their passengers and prepare for the return voyage. These vessels are not liable to assessment and taxation under the laws of California.

1854. *Paddleford, et al., vs. City of Savannah*, 14 *Georgia*, 438. Berming, J.—An ordinance of Savannah imposing a tax on the gross sales of any commission merchant, without regard to the source from which such gross sales were derived, is constitutional, and does not conflict with *Brown vs. Maryland*, which was held to be over-ruled in the license cases.

1858. *The State of Missouri vs. North, et al.*, 27 *Munson's Reports*, 464. (Scott, J., and Richardson, J., concurring. Napton, J., dissented.)—No State has power, under the Constitution of the United States, in the exercise of its taxing power, to discriminate in favor of its own manufactures and against those of a sister State, and such a tax is void. As a State cannot by direct tax on manufactures of a sister State discriminate against them, so it cannot accomplish such a result by requiring a merchant, dealing

in them, to take out a license, while it levies no such tax upon merchants dealing in goods of its own manufacture.

1860. *Pennsylvania Railroad Company vs. Commonwealth*, 3 Grant Cases, 129. Lowrie, C. J. (Read, J., dissents.) A clause in the charter of the railroad company providing that all tonnage of whatsoever kind or description, except the ordinary baggage of passengers carried or conveyed, shall be subject to a toll for the use of the Commonwealth, of three mills per ton per mile is simply a mode of taxing the company according to the magnitude of its business, and is not intended as a tax on commerce. Such a tax is not in violation of the Constitution of the United States.

1860. *Almy vs. California, C. J. Taney*, 24 *Howard*, 172. Unanimous. This was a stamp tax imposed on every bill of lading on gold or silver exported from California. Held to be a duty on exports, and unconstitutional. Court held it was like Brown vs. Maryland, and a tax on the goods. Also, dwells on the fact that it was levied on gold and silver only, hence it was not intended as a general stamp tax, but a tax on gold and silver exported.

1862. *Flanagan vs. City of Philadelphia*, 6 *Wright*, 231. J. Woodward.—The city of Philadelphia authorized the erection of a bridge at Chestnut street, which bridge interfered with the navigation of the river Schuylkill, although it did not destroy navigation altogether. Held that it was not in conflict with the Constitution of the United States. "The sum of the whole matter is, that so long as the Legislature comes into conflict with no constitutional enactment of the general government, in respect to the tide-waters of the river Schuylkill, they may bridge those waters upon such terms and conditions as do only impair and diminish the freedom of navigation without destroying the right altogether."

1864. *New Jersey vs. Delaware and Lackawanna Railroad Company*, 1 Vroom, 473. Haines, J., (Van Dyke, J., dissents.) A State law levying a special tax on the business of a foreign corporation, doing business in the State, such tax being graduated by the number of passengers and weight of goods carried, is not in violation of the Constitution. Such commerce is not of such a national character, that a State may not regulate it in the manner complained of without violating the Constitution. That a tax is merely a tax on the company according to the amount of its business, and is not a regulation of commerce among the States.

1864. *The Bank Tax Case*, 2 *Wallace*, 200. Nelson, J., unanimous.—A tax laid by the State of New York on every bank, or a valuation equal to the amount of the capital stock paid in, or received to be paid in, is a tax on the property of the institution and not on the franchise, and when that property consists of bonds of the Federal government, which are by law exempt from State taxation, the law laying the tax, as to them, is void.

1865. *Gilman vs. The City of Philadelphia*, 3 *Wallace*, 713. Swayne, J., delivered the opinion. (Clifford, Wayne and Davis dissent.) (Nelson, J., did not sit.)—The city of Philadelphia had authorized the erection of a bridge over the Schuylkill river at Chestnut street. The Schuylkill at that point ebbs and flowed, and the bridge interfered with the free navigation above that point. Held to be constitutionally within the power of the State. The States have a right to erect bridges over navigable streams, and the power to regulate commerce lodged in Congress is not exclusive of a like power in the State so far as navigation is concerned, the State acting in good faith and Congress not having acted. "It must not be forgotten that bridges which are connecting parts of turnpikes and railroads, are means of commercial transportation as well as navigable rivers," and concedes the power of the State to regulate transportation over railroads. "Until the dormant power of the Constitution is awakened and made effectual by appropriate legislation, the reserved power of the State is plenary, and its exercise in good faith cannot be subject of review by this court."

1867. *Crandall vs. State of Nevada*, 8 *Wallace*, 35—J. Miller, unanimous as to result; Chase, C. J., and Clifford, J., dissent as to the power of the States.—This case arose out of a law of the State of Nevada taxing every transportation company so much *per capita* on each passenger carried out of the State. Held to be unconstitutional, not on the ground of its being a duty on imports or exports, or a regulation of commerce, but because it interfered with the right of every citizen to freely visit the national capital for the purpose of attending the government. "Inasmuch, therefore, as the tax does not in itself institute any regulation of commerce of a national character, or which has a uniform operation over the whole country, it is not easy to maintain, in view of the principles on which these cases (Gilnor vs. Philadelphia, and Cooley vs.

Board of Wardens) were decided, that it violates the clause of the Federal Constitution which we have had under review."

1867. *Steamship Company vs. Port Warden*, 6 *Wal.*, 31, Chase, C. J., unanimous. An act of Louisiana levying a tax of five dollars on every vessel entering the port of New Orleans, to be paid to the Port Warden, whether they rendered any service to the vessel or not, held to be unconstitutional, to be a regulation of commerce and also a duty on tonnage. The case was decided on the ground that the charge in question was not for pilotage or an offer of pilotage, but was a tax for the privilege of entering the harbor, as well as a direct levying of a duty on tonnage.

1867. *The Society for Savings vs. Corte*, 6 *Wallace*, 594.—Clifford, J., [Chase, C. J., and Grier, J., and Miller J., dissented.]—A statute of a State requiring savings societies, authorized to receive deposits but without authority to issue bills, and having no capital stock, to pay, annually, into the State Treasury, a sum equal to three-fourths of one per cent. on the total amount of their deposits on a certain day, imposes a franchise tax and not a tax on property. Consequently the fact that a savings society so taxed has invested a part of its deposits in securities of the United States, declared by Congress, in the act which authorized their issue, to be exempt from State taxation, does not exempt the society from taxation to the extent of the deposits so invested.

1867. *Provident Institution vs. Massachusetts*, 6 *Wallace*, 611. Clifford, J., (Chase, C. J., and Grier and Miller, J. J., dissented.) A law of Massachusetts imposing a tax on every savings society, on account of its depositors, at a certain rate on the average amount of its deposits for the six months preceding the first of May and November, is a tax on franchise and not on property. Accordingly, a savings institution having a portion of its deposits invested in Federal securities, declared by the act authorizing their issue to be exempt from all State taxation, is liable under the statute to a tax on account of such deposits as on account of others.

LEWIS WALN SMITH,
F. CARROLL BREWSTER,
Attorney General of Commonwealth,
For defendant in error.

APPENDIX.

IN THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT.

MAY TERM, 1869.

OPINION OF THE COURT IN THE TONNAGE TAX CASES.

Commonwealth *vs.* Philadelphia and Reading R. R. Co.	Error to the Court of Common Pleas of Dauphin county.
Commonwealth *vs.* Erie Railway Company.	Error to the Court of Common Pleas of Dauphin county. Two cases.
Commonwealth *vs.* Lackawanna and Bloomsburg Railroad Co.	Error to the Court of Common Pleas of Dauphin county.
Commonwealth *vs.* Monongahela Navigation Co.	Error to the Court of Common Pleas of Dauphin county.
Commonwealth *vs.* Cleveland and Pittsburg R. R. Co.	Error to the Court of Common Pleas of Dauphin county.

The above cases were heard by the Supreme Court of Pennsylvania, sitting at Harrisburg, in the May term of 1869.

Benjamin Harris Brewster, Attorney General, and Lewis Waln Smith, Deputy Attorney General, for the Commonwealth.

J. W. Simonton, James E. Gowan, R. A. Lamberton and John C. Kunkle for the defendants in error.

OPINION OF THE COURT.

The opinion of the court was delivered by Mr. Justice Agnew.

Although disagreeing with the learned judge of the court below in these cases, we must concede the ability with which he has handled the question in them. But a case of simple doubt should be resolved favorably to the State law, leaving the correction of the error, if it be one, to the federal judiciary. The presumption in favor of the acts of a co-ordinate branch of the State government, the relation of her courts to the State, and above all the necessity of preserving a financial system, so vital to her welfare, demand this at our hands. When convinced that the State law is really repugnant to the Federal Constitution we must yield the supreme authority of the latter.

The question before us arises under the act of the Legislature of Pennsylvania, approved August 25, 1864, entitled "An Act to provide additional revenue for the use of the Commonwealth," P. L. 1864, p. 988. It is solely a revenue law, has no other purpose, and is in substance, this: That the financial officers of all railroad, steamboat, canal, slack-water navigation and transportation companies, (excepting turnpike, plank road and bridge companies,) upon whose works freights are transported by themselves or others, for freight or tolls, shall make quarterly returns to the Auditor General, stating fully and particularly the number of tons of freight carried over or upon their works, and shall pay to the State Treasurer, for the use of the Commonwealth, a tax on each 2,000 pounds of freight so carried at rates designated in the act, and founded on a classification of the freights, so as to distinguish between the heavy and bulky and the lighter kinds, and thus to graduate the tax equitably in order to meet the greater expense of transportation. The act also confines the tax upon freight carried over continuous lines by several companies to a single one, to be designated by the Auditor General, so as not to charge the tax twice on freights carried over the same line of improvements.

The corporations, defendants in the foregoing cases, dispute the validity of this tax, alleging that it is a regulation of commerce, or an impost act beyond the power of the State. To solve the question it will be proper to notice first the admitted relations between the Federal and State governments. Upon the declaration

of the independence of the colonies, in 1776, they became separate and sovereign States; the rights of the crown devolving upon them by revolution being confirmed to them by the treaty of peace. In entering into the Federal Union they parted only with some of their sovereign powers; all the undelegated and unprohibited being reserved to the States or to the people thereof. Amendments Const. U. S., Art. 10, M'Ilvaine vs. Coxe, 4 Cranch, 209; Cohens vs. Virginia, 6 Wheaton, 414; Briscoe vs. Bank of Ky., 11 Peters, 258. Each government, State and Federal, is sovereign within its own sphere. Gibbons vs. Ogden, 9 Wheaton, 1; M'Cullough vs. Maryland, 4 Wheaton, 316; Bank U. S. vs. Daniel, 12 Peters, 33; Bank Augusta vs. Earle, 13 Peters, 520; Briscoe vs. Bank of Ky., 11 Peters, 258; Ohio L. Ins. Co. vs Debolt, 16 Howard, 428; Dodge vs. Woolsey, 18 Howard, 349; Alleman vs. Booth, 21 Howard, 506.

In speaking of "that immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government, all of which can be most advantageously exercised by the States themselves," Chief Justice Marshall says: "Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the *internal commerce* of a State, and those which respect turnpike roads, ferries, &c., are competent parts of this mass," Gibbons vs. Ogden. Among the most important reserved State rights, and one directly connected with the question before us, is that of eminent domain. This undoubted power has been exercised in the improvement of navigable streams, and in building and establishing ferries over them, and in the construction of roads, turnpikes, canals and railroads; and has been repeatedly recognized in authoritative decisions. *Rivers*—See Wilson vs. Blackbird Creek co., 2 Peters, 245; Martin vs. Waddell, 16 Peters, 367; Kelley vs. Union co., 12 Conn., 7; Thames Bank vs. Lovell, 18 Conn., 500; Veazie vs. Moore, 14 Howard, 568. *Bridges*—Pa. vs. Wheeling Bridge Co., 18 Howard, 430; Gilman vs. Phil'a, 3 Wallace, 713. The Passaic Bridge, 3 Wallace, 782; Flanigan vs. Phil'a, 6 Wright, 231. *Ferries*—Conway vs. Taylor, 1 Black, 603; Freeholders vs. New Jersey, 4 Zabriska, 718. Under this invaluable power the States have built up a net work of railways and canals and have improved natural channels

through which the commerce of the whole Union is coursing, like the life blood throughout the natural system. This was not done under any supposed authority to regulate interstate commerce, or to aid in the execution of the federal power over commerce between the States; but was done under the unquestioned power of the State to improve her own resources, and to regulate her internal affairs. Yet does any one doubt the grand and beneficial impulse given to interstate commerce by this exercise of State power? And who can doubt that the State has a right to compensation for this expenditure of her means and the benefit she has conferred on all who use her works? They were built by herself or under her franchises, and the right to exact tolls, charges and fares for their use, is a necessary consequence of her power to construct them. Nor does it make any difference what form her compensation takes—whether that of a direct charge on the tonnage using the road, or that of a tax on the corporations who use her franchises—her right is to exact the compensation from those who use the works. To gainsay this is to deny her right of eminent domain, and her power to legislate upon her internal affairs and the creations of her own sovereignty. If these works were, as once some of them were, in her own hands, what provision in the Federal Constitution would forbid her to increase her revenue by an increase of the charge of transportation over them? When in the hands of creatures exercising her franchises, what clause in any instrument forbids her to tax the franchises, and to authorize the tax to be added to the pre-existing tolls and charges? To legislate once, is not to exhaust her power over the subject of tolls or charges, but to legislate at all is to assert her power. Whether it be called a toll or tax, what is this but to increase a charge which she can rightfully demand? The right to demand any toll or charge upon all articles transported, or fares for passage, is derived from her grant, and the power to determine their extent depends on her discretion. It is a right of which she cannot be deprived, and of which she is the only judge, unless, perhaps, the power should be so unreasonably and oppressively exercised, as to afford evidence of a design, by a fraudulent use of the power to interdict or ruinously affect the commerce of other States. To say, because her citizens engage in mining for an extra territorial market, or because merchandize may pass over these works out

of or into the State, that to exact tolls and charges for the minerals or merchandize transported over them, or to tax the franchises of those engaged in work, is a regulation of commerce, is to confound all just distinctions and to destroy the most sacred right of a State. Her power to levy revenue from transportation over these works may be seen in her power over the works themselves. If compensation were denied her by way of revenue, who can dispute her power to suffer her own works to fall into decay and ruin; or when unfettered by a charter contract, to repeal the charters under which they were built. Interstate commerce might suffer, but what power could control the act? Then on what principle is it she cannot levy a tax on these instrumentalities, for the privileges granted, because the products carried are destined for points without, or from without to points within the State? It is carriage, not destination, which gives the right of toll, tax or charge. It is not levied on them because the products go out or come in, but because they have the privilege and the benefit of transportation. They are not arrested and forbidden to enter or leave the State till a charge is paid—that would be a duty on imports or exports, and a regulation of interstate commerce. They are not discriminated against and required to pay more than others pay, because they go out or come into the State—that would be a regulation and a tax on interstate commerce—but they pay as all other products carried within the State pay, a charge for transportation—no more, no less, but the same exact freight paid by all others. The tax in this case is merely a charge upon the corporation for the freight carried over the road, levied equally on all, and rated equitably according to the character of the freight and the expense required to move it. It is clearly nothing but a tax on the business of the road, measured by the number of tons carried over it.

But the right to impose it does not rest solely on the ground of compensation for the use of works constructed under the eminent domain of the State, though this fact stamps the subject of taxation with its true character. Taxation is an independent power of the State, both fundamental and vital; and unlimited, except by the express prohibitions of the Federal Constitution, or by implication when it infringes directly on the exercise of Federal power. "It is admitted (says C. J. Marshall) that the power of taxing the people and their property is essential to the very exist-

ence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it." "The sovereignty of the State (he says) extends to everything *which exists by its authority*, or *is introduced by its permission*, but does not extend to those *means* which are employed by Congress to carry into execution powers conferred on that body by the people of the United States." M'Cullough vs. Maryland, 4 Wheaton, 316. These principles furnish a solution to the question before us. The works over which this tonnage is transported owe their existence to the State. That which is transported is carried by the permission of the State, contained in the charters granted by the sovereign power. The business done upon them was the object and is the result of the exercise of that sovereignty. It bears no touch of the Federal power. It is forbidden by no prohibition of State power. It owes its existence to no purpose, and no law of Congress, and was not created to carry out any one of the powers of the Union. It being an undoubted creation of the State, and a subject of State sovereignty, it is, therefore, clearly within the State power of taxation. Hence, it is immaterial how the subject of taxation is measured, by weight or by enumeration. The Pennsylvania ton of 2,000 pounds is a convenient and equitable means of measuring the subject of the tax, and in ordinary speech it is called a tonnage tax, or a tax on weight. But it is not on this account to be confounded with the tonnage of capacity, forbidden by the Federal Constitution, to be taken by the State. And it is evident it does not matter whence or whither these tons travel, so that there be no discrimination, to forbid or to burden their entrance into or exit from the State, and being a tax on the benefit and the privilege of transportation on works constructed for this end, it bears equally on all. Nor can it make any difference, as we have already seen, that the company is allowed to add this tax on its franchises to the tolls or charges on the freight itself. It is the owner of the freight who enjoys both the privilege and the facility this valuable franchise affords, and whose toll could be increased by the State to the same extent if the works were in her hands. It falls upon those who use the road, not because it is a regulation of commerce, but because it is a subject of internal regulation, to which he is bound to contribute. There is in fact and in authority a substantial dis-

tinction between an act which simply operates as a burden on commerce and one which attempts to regulate it. No one can doubt the power of a State to tax her own coal, iron, lumber, grain and other products of her mines and soil, and the persons and occupations of those engaged in their productions or their transportation, and yet these burdens eventually fall on those who consume them, whether they live in or out of the State. Yet, clearly, such taxation is no regulation of commerce. The State in laying a common tax on all such articles is not bound and cannot be presumed to know where they will be consumed, nor to inquire their destination of those who traffic in or transport them. If she do not discriminate between that which goes out or comes in and that which remains within, it cannot be said that she in any sense attempts to regulate commerce with other States, or to impose a duty on imports or exports. In principle, where there is no discrimination, there is no difference between a tax on a transporter, whether in gross or measured by the tons he carries, and a tax on the farmer, the manufacturer, the miner, the merchant or the broker, measured by the business he does. Yet, all the impositions are burthens which reach the consumer wherever he lives. The fallacy of the argument, which insists that the burdens of internal transportation shall not be shared by the distant consumer, on the ground that it is an import or export duty, or a regulation of commerce, is seen in the fact that to exempt articles going out of the State, would be to discriminate in favor of the foreign and against the domestic consumer. Coal carried from the mines to Richmond, on the Delaware, and there disposed of, is conceded to be liable to the tax, but if intended to be sent forward to places without the State, it is said not be liable; what is this but to impose a tax on our own citizens, which those beyond the State are not to bear? Pennsylvanians are citizens of the same Union and entitled to its equal protection against such discrimination.

This leads to a more particular consideration of what is meant by a *regulation* of commerce. The subject was so thoroughly examined and stated by Chief Justice Marshall, in Gibbons vs. Ogden, 9 Wheaton, 1, that case remains until this day as a land mark in the interpretation of the Federal Constitution. "Commerce," he says, "describes the commercial intercourse between nations and parts of nations in all its branches, and *is regulated*

by prescribing rules for carrying on that intercourse." Again, "It is the power to regulate, that is *to prescribe the rules by which commerce is to be governed.*" This accords also with the root and definition of the word. *Regula*, a rule—*Regulate*, to adjust by rule—*as to regulate weights and measures—to regulate the assize of bread—to regulate trade*—Webster. Now, clearly, this tax was not imposed or intended to be a rule to regulate traffic or intercourse, but was a simple measure of revenue. The purpose was not to regulate transportation, but to raise money for the support of government. This exercise of authority flows from the power to tax for revenue, not from a power to control commerce.

This distinction is very clearly stated by Chief Justice Marshall, in Gibbon vs. Ogden, proving that the prohibition to lay imposts or duties on imports or exports and a duty on tonnage, is an exception from the State power of *taxation*, and not from the power to regulate commerce. This tax being a revenue measure and not a regulation of trade, it is very clearly not a duty on exports or imports or on tonnage. "An impost or duty on imports," says the same judge, "is a custom or tax levied on articles brought into a country." Brown vs. Maryland, 12 Wheaton, 419. The same definition will apply, *e converso*, to articles taken out as a duty on exports. That the tax in this case is not such a duty is manifest from what has been said. The law does not single out the freight going out or coming in and lay the tax accordingly. It is not a price paid for admission or departure. It meets the articles neither at the State line nor elsewhere with a license to be paid for entrance, exit, or sale. Nor is the tax a tonnage duty laid on vessels or the means of freightage necessary for the purpose of commerce to and from the State. It is simply a tax on internal carriage, not differing in principle from a tax on draymen, stage companies or other taxes on railroad and navigation companies, admitted to be lawful. *Tonnage duties* are duties laid on the carrying capacity of vessels, the only means or instruments of distant commerce known at the adoption of the Constitution, though doubtless the principle is applicable to railroad tonnage as a means of external commerce. The early act of Congress of July 20, 1790, regulating tonnage duties, provides that upon all ships or vessels which shall be entered in the United States from any *foreign* point or place, these shall be paid the several and re-

spective duties following. That is to say, etc. The act of March 2, 1799, provided the rule for the measurement of the tonnage of each vessel. The nature of the subject, the legislation and practice of the government, and the well known meaning of the terms used, render it clear that the tax in question is not a duty on exports or imports, or on tonnage.

That the positions taken in this opinion are sound is proved, I think, by the very cases cited as authorities against the tax. The grounds on which they are severally rested as violations in each case of the prohibitory clauses of the Constitution, or as specific restrictions upon commerce, and the recognition in nearly all of them of the power of the State to impose taxes on internal commerce, proves with clearness that the tax in this case falls within the scope of none of the cases.

Brown vs. Maryland, 12 Wheaton, 418. The case, perhaps, most relied on bears no anology in features or principles. The question as stated by C. J. Mashall, was "whether the Legislature of a State can constitutionally require the importer of foreign articles to take out a license from the State before he shall be permitted to sell a bale or package so imported." It was held that this was a tax on imports and also a regulation of commerce, on the ground that sale is the object of importation, and a restraint upon it is a regulation of intercourse. Stress has been laid upon the illustrations used by the Chief Justice, in his argument against the power of a State to impose injurious burthens on commerce, as for instance, to tax goods in transit through the State from port to port for the purpose of *re-exportation*, or articles passing through for the purpose of traffic, or the transportation of goods from the State itself to other States for commercial purposes. But the Chief Justice had reference to specific burdens. These subjects must not be singled out and taxed, for this would be discrimination affecting intercourse, invidious and inviting retaliation from other States or foreign powers. But he did not mean by these illustrations that those who use the artificial works, constructed by the State or under their franchise, might so do without compensation because they transported their goods on them for such purposes, or that they are not bound to share with our citizens the equal burdens which is the price they must pay for availing themselves of these facilities. The entire opinion of

Chief Justice Marshall in that case, and in Gibbons vs. Ogden, shows that he never meant to carry the doctrine of federal intervention to such a wild length within the domain of the State. A full answer to such an argument is found in the recent tax cases, 5 Wallace, 462 and 474, deciding that a law of Congress gives no authority to carry on a business within a State forbidden by its laws. The Chief Justice says of the power of the State, "but very different considerations apply to the internal commerce or domestic trade of the State. Over this commerce Congress has no power of regulation, nor any direct control. This power belongs exclusively to the State." To these cases may be added the license cases, 5 Howard, 504, supporting the State power to require a license to carry on a certain traffic in imported articles even in the barrels or cases in which they had been imported.

M'Cullough vs. Bank of Maryland, 4 Wheaton, 316; Weston vs. City of Charleston, 2 Peters, 449; Dobbins vs. County of Erie, 16 Peters, 435; Bank of Commerce vs. City of New York, 2 Black, 620. These cases need no comment, but to say that they rest on the ground that the State government cannot lay a tax on the constitutional means employed by the government of the Union, to execute its constitutional powers. Therefore, the loans, fiscal means and salaries of officers of the Federal government cannot be taxed by the States, as they might be taxed out of existence. But even this protection has its limits, when these things become mingled in the mass of State property as is evidenced by the Bank Deposit cases, 6 Wallace, 594, 611, which hold that deposits of savings institutions invested in U. S. securities are liable to taxation notwithstanding the securities themselves are exempted. The tax being in fact on the franchise and not on the security. The analogy between that tax and the one before us is striking, the franchise being the subject and the burden on property the effect.

The Passenger cases reported in 7 Howard, 283, have been largely cited from in the argument. From the strength and character of the dissents entered in them, it is difficult to determine the true value of these cases upon the points for which the views of the assenting and dissenting judges have been quoted. And it is not material, as the cases bear but little on the present question, while they illustrate the fact that a State law must operate

directly as a regulation of commerce before it will be pronounced unconstitutional. In each of the cases the law was held invalid as a naked attempt to levy a tax on passengers from foreign ports, without any sufficient ground of State protection or service for which the tax could be exacted, and it was therefore not less a tax in effect though not in form on the vessel, and a regulation of commerce.

Hays vs. Pacific Mail Steamship Company, 17 Howard, 596, is much the same in principle as the Passenger cases. It was an attempt on the part of California to impose a tax on New York vessels in the port of San Francisco. The law was directly extra-territòral in its operations, and an interference with the State commerce.

Almy vs. California, 24 Howard, 169.—California levied a stamp duty on bills of lading of gold exported from the State. The necessary connection between the bill of lading and the shipment made it essentially a duty on the gold exported. The case was put on the ground that the tax was a duty on exports, and not on the ground that it was a regulation of commerce. This case is valuable, because of the distinction between taxation and regulation, and of the fact that the opinion was delivered by Taney, C. J., who had said, in the Passenger cases, 480, after citing Chief Justice Marshall on the same point: "I may therefore safely assume that, according to the true construction of the Constitution, the power granted to Congress to regulate commerce did not in any degree abridge the power of taxation in the States." "They are expres ly prohibited from laying any duty on imports or exports, except what may be absolutely necessary for executing the inspection laws, and also from laying any tonnage duty. *So far* their taxing power on commerce is restrained *but no further.* They retain all the rest, and that the money demanded is a tax on commerce, or the instrument or vehicle of commerce, furnishes no objection to it unless it is a duty on imports or tonnage, for they alone are forbidden."

The State vs. North., 27 Missouri, (6 Jones,) 464, so much relied on, proves nothing to the point. It was a case of direct discrimination against the citizens of other States, founded on a statute of Missouri, requiring merchants to "pay an *ad valorem* tax equal to what is laid on real estate, upon all goods, wares and

merchandise purchased by them, *except* such as may be the growth, produce or manufacture of the State, and except such unmanufactured articles as may be the growth and produce of other States. "It presented," said Scott, J., delivering the opinion of the court, "the question of the power of the State in the exercise of the right of taxation to *discriminate* between the products of this State and those manufactured in other States." It does not touch the present question, and one judge out of three dissented.

Erie Railway Company vs. New Jersey, 4 Law Register, 238, is a case of similar character to the last, and was decided upon a statute of New Jersey, imposing a transit duty on the corporations of *other* States laid on tonnage carried by them through New Jersey. The case fully concedes the power of a State to levy taxes which may incidentally affect interstate commerce, and places the invalidity of the tax on the ground of special discrimination. "This tax (said the Chief Justice) falls on interstate commerce alone. It reaches no further. The burthen is not on general business, one branch of which is the transportation of extra territorial goods. On the contrary the only business of the plaintiff which is *not* taxed, is the business of such company done entirely in New Jersey, and which does not consist of the transportation of merchandise from State to State. The law discriminates and selects the transportation of commodities passing from State to to State as the *peculiar* objects of the duty." He then proceeds to show the true character of such discriminating laws or regulations of interstate commerce, and their disastrous effects on the relations of States.

Steamship Company vs. Port Wardens, 6 Wallace, 31. This case has no bearing on the point before us. It was a bold attempt to levy a duty of five dollars on every vessel entering the port of New Orleans, in the form of a fee to the master and wardens of the port, "whether called on to perform any service or not." It was held to be both a tax on tonnage and a regulation of commerce.

I have not been able to have access to the nineteenth volume of Louisiana annual reports, to examine the case of the State vs. Kennedy. The quotation from it seems to have no special bearing on the case in hand. The last case is Crandell vs. Nevada, 6 Wallace, 35. Nevada enacted "that there shall be levied and collected a capitation tax of one dollar upon every person leaving the State

by any railroad, stage-coach or other vehicle engaged or employed in the business of transporting passengers for hire," to be collected and paid by the carriers. A noticeable feature of this case is that the repugnance of the State law to the Federal Constitution is denied to rest on the ground that it is a regulation of commerce in conflict with the Federal law, and it is placed on the restriction of the constitutional right of all citizens to freely pass to the seat of government, the sea ports, the public offices, and to other points on business with Federal agents and in the Federal service. But had it been laid on other grounds, still like the Missouri and New Jersey cases, it was a clear case of discriminating against intercourse with other States, which, if admitted as a valid State power, could be carried to the point of interdiction by increased taxation.

I have deferred noticing the favorable case of the Pennsylvania Railroad Co. vs. Commonwealth, 3 Grant, 129, because of the alleged distinction, that the tonnage tax there is justified by the contract of the company found in its charter. But the decision was not rested on that ground; it was placed on the broad basis that the three mill tax per ton is simply a mode of taxing the company according to the magnitude of the business, justified by the nature of the subject and the power of the State over it, and is not repugnant to the powers conferred upon Congress or the prohibitory clauses against laying duties on imports, exports or tonnage. Nor do I think that a contract relation helps the opposite argument. Let it once be conceded that the State law is in fact a regulation of interstate commerce, or imposes a tax on imports, exports or tonnage in the sense of the Federal Constitution, and the contract relation will not justify it. The State cannot accomplish by contract what she cannot accomplish by law.

The act we are now considering is in no sense a regulation of commerce or an attempt to tax interstate commerce. It is the lawful exercise of State power over creations and uses brought into existence by her own authority; a proper tax upon the use of the franchises granted by her for the benefit of all alike who employ them, and in consideration of valuable privileges and facilities furnished to them by her authority and permission. The subject is wholly internal and the imposition equal in its operation and equitable in its distribution; while to exempt freight passing out or coming into the State from its operations, would be unjust

discrimination against our own citizens and in favor of the citizens of other States. The case is not rested on the debatable ground of State power to regulate interstate commerce in the absence of Congressional legislation on the same subject, but on the admitted right of a State to execute its power of eminent domain in the construction of works for the transportation of freight and passengers, and to legislate and tax their use by those who choose to employ them, as undoubted subjects of her domestic affairs and of that internal commerce which she can rightfully control so long as she does not fraudulently exercise her power to the injury of the citizens of other States.

For these reasons the judgments in all the cases are reversed and writs of *venire facias de novo* awarded in each case.

Read, J., dissents.

STATE OF PENNSYLVANIA:

I hereby certify the foregoing to be a true and correct copy o the opinion and judgments of the Supreme Court of Pennsylvania, in the above stated causes, so full and entire as it remains of record in this office.

In witness whereof, I have hereunto set my hand and seal of said Supreme Court, this 9th day of July, A. D. 1869.

[L. S.] WALLACE DE WITT,
Prothonotary.